

Government of the District of Columbia



Office of the Attorney General

---

Testimony of  
**Robert J. Spagnoletti**  
Attorney General

*Public Hearing on*  
*B16-247 the Omnibus Public Safety Act of 2005*  
*B16-172 the Criminal Code Reform Commission*  
*Establishment Act of 2005*  
*B16-130 the Criminal Code Modernization*  
*Amendment Act of 2005*

Committee on the Judiciary  
Phil Mendelson, Chair  
Council of the District of Columbia

May 31, 2005

Room 500  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Washington, D.C. 20004  
11:00 A.M.

Good morning Chairman Mendelson, members of the Committee on the Judiciary, and guests. I am Robert J. Spagnoletti, Attorney General for the District of Columbia, and I am pleased to appear before you today on behalf of Mayor Williams and his administration to testify on Bill 16-247, the Omnibus Public Safety Act of 2005 (the “Bill” or “Omnibus Bill”). This Bill contains twenty-two separate titles designed to fill gaps in the criminal code, improve public safety, hold offenders accountable, and protect the privacy of the District’s citizens. As I, and other witnesses, will discuss during the course of this hearing, the Bill is a moderate, but critically important step in addressing violent crime. It is the cornerstone of the Mayor’s efforts to further continue the reduction in crime that the District has experienced over the past two years. I will also offer the Committee some thoughts regarding the Criminal Code Reform Commission Establishment Act of 2005 and the Criminal Code Modernization Amendment Act of 2005.

Before discussing the Omnibus Bill, it is important to recognize that this Bill is only one part of the Mayor’s strategy to improve public safety in the District of Columbia. As you know, the District has experienced a significant reduction in crime – across all categories – for two consecutive years. This reduction can be attributed to a multifaceted approach that includes aggressive and coordinated law enforcement, effective prosecution strategies, an infusion of human services to address the conditions that lead to criminal activity, and community involvement. Crime in designated hot spots fell considerably, as did crime in the District, overall.

The Mayor intends to build on this multi-disciplinary approach with a number of programs, including the following:

- Increased preventive programs for juveniles, including a program aimed at juveniles who have been convicted of motor vehicle thefts or unauthorized use of a vehicle (“UUV”). Spearheaded by the Metropolitan Police Department (“MPD”), this is a multi-agency collaborative effort to address the growing number of juveniles involved in the theft and illegal operation of cars in our City. They developed a six-month program with the objective of decreasing recidivism.
- The Mayor is addressing adult recidivism rates by dedicating nearly \$3 million (\$2 million from a grant from the Department of Labor) to the Transition from Prison to Community Initiative, including the Reentry One-Stop-Shop pilot program. The One-Stop-Shop pilot program is a comprehensive approach to reintegrating offenders back into the community by providing services to the offender and his or her family. The services include, among other things, psychosocial services, health insurance, and training on life skills. Since April of 2004 when it was created, the One-Stop-Shop pilot program has served roughly 300 offenders and has helped nearly 75 percent of those participants obtain employment. Because of the success of the pilot program, the Mayor’s goal is to expand the program to assist another 2500 individuals that need services in order to reintegrate back into the community.

- In addition to more services for offenders, the Mayor has committed tremendous resources to serving victims. On May 4, the Mayor announced that he is committing \$16.8 million to increase services for victims of crime in the District. By providing needed resources to the victims of these crimes we hope to obtain an added benefit--that is breaking the cycle that leads youthful victims of crime from modeling their behavior on abusive and violent individuals.

Even with these commitments, more needs to be done to stem violent crime. As part of his comprehensive approach, the Mayor has introduced the Omnibus Public Safety Act of 2005.

The Bill lays the foundation for both technical and critical changes that are aimed at, among other things, addressing the laws that govern violent crime, protecting children and the elderly, reducing property crime and prostitution, and protecting the privacy of District citizens.

Through legal changes outlined in Bill 16-247, we can enhance public safety by:

- Reducing gun violence by establishing gun free zone areas within 1,000 feet of public housing;
- Strengthening local District laws that prohibit felons from carrying firearms;
- Enhancing the penalties for crimes against senior citizens and children;
- Protecting law enforcement by making an assault on a police officer a crime of violence, creating appropriate penalties for armed and unarmed assaults, and making it a felony to possess pistol ammunition that is capable of penetrating Kevlar jackets;
- Creating a new offense, with an appropriate penalty, for assaults that result in bodily injuries to victims;
- Expanding the definition of intrafamily offense to include criminal offenses committed by new and former partners and to protect victims of stalking;
- Making it unlawful to disable a telephone to prevent or interfere with a person's ability to report a criminal offense or child abuse;
- Striking out at criminal gangs by criminalizing gang recruitment and retention;
- Tightening loopholes in our sexual assault statutes;
- Expanding the list of those who must report child neglect and requiring reports of child victimization;
- Making it a crime to contribute to the delinquency of a minor;
- Outlawing prostitution, creating prostitution-free zones similar to drug-free zones, and increasing penalties for persons who encourage children to engage in prostitution;
- Establishing a new offense for a child's willful failure to appear in a delinquency case; and
- Prohibiting people from using a peephole, mirror, or camera to spy on persons using the bathroom, changing clothes or engaging in sexual activity or recording such persons without their consent.

The Committee will notice that a number of the proposals contained in the Mayor's Omnibus Bill rely upon new, or enhanced, criminal penalties. If we have learned anything about effective public safety policy, it is that no single approach to crime reduction is, alone,

enough. Thus the Mayor's crime reduction initiatives are multifaceted. The same is true of any effective sentencing scheme. To be of value, it must account for varying factors, including the risks and costs associated with different penalties. This naturally leads to the question: what value is there to an enhanced penalty scheme?

In designing any sentencing scheme, considerations include the five basic philosophical perspectives underpinning criminal law: general and specific deterrence, retribution, incapacitation, rehabilitation, and restoration. On the lower end where non-violent offenses are at issue, the District recognizes the need for alternatives to traditional prosecution and sentencing. Our two Community Courts – one staffed by the OAG and one staffed by the United States Attorney's Office ("USAO") – have evolved into a model for the disposition of low-level offenses and offenders. There, and through other programs offered by OAG and the USAO, offenders may be tasked with community service or any number of alternatives short of prosecution. At this end of the spectrum, rehabilitation and restoration generally drive criminal justice philosophy and result in alternatives to traditional prosecution.

In the middle of the spectrum there are low-level repeat offenders or those who commit more serious, but not necessarily violent or dangerous crimes. For these individuals, all philosophical approaches to criminal justice and sentencing become relevant. Here, prosecutors, judges, law enforcement, probation officers and others must apply elements of rehabilitation and restoration, but also must consider whether the offender has sufficient incentive not to reoffend (specific deterrence), whether the offender has caused sufficient harm that he must be punished (retribution and general deterrence), and whether the offender presents a substantial risk to the community (incapacitation). Thus, for the vast majority of offenses and offenders, all five philosophical perspectives inform sentencing decisions. It is in this range that sentencing discretion is most important.

At the top of the range, when the nature of the crime is particularly violent or the risk posed by the offender to the community is so great, incapacitation and deterrence become the most important concerns. Thus, in seeking to strengthen our laws in regard to sentencing enhancements, whether they include mandatory minimum or longer sentences, the Omnibus Bill focuses on high risk offenders and dangerous or violent crimes.

Although some assert that the length of a sentence is not a deterrent, there is some research that suggests that increasing either the severity of the penalty or the certainty of getting caught and convicted has at least a modest deterrent effect. See Daniel Kessler, Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation, 42 J. Law & Econ. 343 (1999). Moreover, if anything is clear from the research, it is that measuring the actual deterrent effect of more severe penalties is, at best, difficult. *Id.* This is true because other effects on crime reduction, including incapacitation, are working together at the same time.

Importantly, there has been a reduction in crime nationally over the past decade and that reduction took place during the same period when sentencing policies were changed. This certainly raises the likelihood that changes in sentencing policy, including stiffer sentences, contributed to this reduction. However, to credit any single sentencing policy—or even to credit sentencing policies entirely—would be naïve. That said, it would be equally naïve to

underestimate the effect that more severe sentences have had in reducing crime—particularly violent crime. Moreover, where guns, violent crimes, and dangerous and habitual offenders are concerned, we should not undervalue the importance of incapacitation. Even if we cannot say with absolute certainty that incarcerating one violent offender for a long period will reduce the odds that another person will commit an equally violent crime, we most certainly can say that the one who is incarcerated will not. Therefore, if incapacitating a violent offender means that one innocent person will be spared harm, then stiffer sentences most certainly play a role in enhancing public safety.

Now, I would like to discuss each title of the Mayor's Bill in more detail.

### Title I – the Gun Violence Amendment Act of 2005

The purpose of Title I, the Gun Violence Amendment Act of 2005, is to reduce gun violence. According to the Official Uniform Crime Reporting statistics for D.C., in 2004 there were 157 homicides that involved a gun, 1,495 armed robberies with a gun, and 780 aggravated assaults involving a gun. According to data maintained by MPD, 2,065 firearms were recovered in the District in 2004. This was an increase over 2003 when 1,982 firearms were recovered, and an increase over 2002 when 1,931 firearms were recovered. Moreover, as of mid-May of this year, MPD had already recovered 7% more guns than at the same point in 2004. In short, there are far too many guns on our streets, too much gun violence in our neighborhoods, and too many persons with prior criminal records carrying guns. We must deter this behavior.

Title I of the Bill does a number of things to improve and clarify existing laws in an effort to reduce gun violence. First, it adds public housing to areas that are designated as gun free zones under D.C. Official Code Section 22-4502.01 (commonly called the Gun Free Zones Act). While existing law provides an enhanced penalty for those who possess a gun within one thousand feet of a school, daycare center, playground or a number of other similar locations, the current enhancement provision does not include public housing as a gun free zone. Including the area around public housing is important to ensure the safety of those living in or near public housing, to deter persons from carrying a gun in or near public housing, and to send a message that safe public housing is as important to the community as our schools and other safe places that the law presently recognizes as gun free zones. Indeed, the Council has recognized the importance of designating public housing as a special safe zone in the Drug Free Zones Act, D.C. Official Code § 48-904.07a, and possession of guns in or near public housing should be similarly treated.

Second, the Bill would provide that persons who are found illegally carrying a gun within a gun free zone serve a one-year mandatory minimum term of imprisonment. Here, I would like to address the concept of mandatory minimums and explain why their limited use, in a manner similar to that which the Mayor has proposed in this Bill, is an effective law enforcement tool.

Let me start by emphasizing the success experienced by other jurisdictions, including Richmond, Virginia; Rochester, New York; Philadelphia, Pennsylvania; Baltimore, Maryland

and a number of other cities in Texas, Colorado and elsewhere. These jurisdictions have benefited from a program called Project Exile, or a local adaptation of that program.

Project Exile, and the various local versions of this program, while employing a multifaceted approach to reducing gun violence, is premised on a common theme – that violent crimes involving guns will be punished certainly and severely. Central to the program is the message that those who unlawfully possess a gun will face certain jail time. This means stiff sentences including mandatory minimums. With this basic premise in mind, jurisdictions such as Richmond, Baltimore and Rochester have seen impressive drops in gun related homicides and other violent crimes involving guns. These jurisdictions have similarly reported a reduction in the number of guns that law enforcement officers are encountering and seizing routinely on the streets. In Richmond alone, Project Exile is credited with reducing homicides from 160 in 1994 to only 69 in 2001 – a decrease of 57 percent. In Rochester, a correlation was found between the project’s “stiff sentence” messages and a reduction of guns encountered by law enforcement officers during periods when advertisements conveying this message were aired. In fact, in the weeks following these media campaigns, the number of guns found on suspects was sometimes reduced by as much as half, as compared to the weeks prior to these media blitzes. This is a stark contrast to the rising number of guns being recovered in the District.

While there has been much criticism of mandatory minimums, including research studies that suggest there is little empirical support on which to conclude that mandatory minimums have the intended deterrent effect, much of this criticism and the corresponding research has focused on broad applications of mandatory minimums, such as those applied to drug offenders under federal law. The Mayor’s Bill does not propose such an approach. Rather, the Mayor has carefully selected a limited number of gun offenses to include in Title I of B16-247. Both the results seen by other jurisdictions through their Project Exile type programs, as well as some other empirical research, support the notion that this narrow use of mandatory minimums is, in fact, effective. For example, research conducted in 1992 through a grant supported by the National Institute of Justice yielded the conclusion that programs featuring stiff sentencing initiatives for gun crimes in six jurisdictions<sup>1</sup> resulted in a reduction in gun-related homicides. See McDowell, David; Loftin, Clifton; Wiersema, Brian, A COMPARATIVE STUDY OF THE PREVENTATIVE EFFECTS OF MANDATORY SENTENCING LAWS FOR GUN CRIMES, 83 J. Crim. L. & Criminology 378 (1992). Research also indicates that the vast majority of voters support this use of mandatory minimums and other sentencing enhancements. See *2000 National Gun Policy Survey of the National Opinion Research Center: Research Findings*, Univ. of Chicago (2000); Frank E. Zimring, *Firearms, Violence and Public Policy*, 265 SCIENTIFIC AMERICAN 48, 52 (1991).

Mandatory minimums also serve as important tools for law enforcement in seeking to solve additional crimes. For example, because many mandatory minimums apply only when the prosecutor chooses to invoke an applicable sentence enhancement provision, prosecutors often use this as a tool to gain the cooperation of offenders who, in exchange for a waiver of the enhancement, may be willing to provide information that will aid law enforcement in building cases against other offenders. In fact, Baltimore’s experience with this strongly supports the

---

<sup>1</sup> The research involved six cities: Detroit, Jacksonville, Tampa, Miami, Philadelphia and Pittsburgh.

conclusion that mandatory minimums are an effective tool in gaining cooperation from defendants. In a study conducted by the American Prosecutors Research Institute (APRI), Baltimore prosecutors and police officers reported that defendants frequently cooperate with law enforcement when their other option is a longer prison term or a mandatory minimum. This has enabled police and prosecutors to solve cold cases and to focus attention on the sources of guns—those who are transporting guns into Baltimore’s neighborhoods.

Finally, it should not be lost on any of us that mandatory minimum sentences express the sentiment of the community. Week in and week out my staff and I hear from victims and community members who are tired of violent criminals, particularly those with guns, who are back on the street.

With all of this in mind, the Mayor has proposed a one year mandatory minimum for those who possess a gun in a gun free zone. If the Council is serious about sending a message to those who plague our neighborhoods with guns and the violence associated with guns, then the Council will require that these offenders pay the price. Twenty-four of the District’s children were killed last year -- eighteen of them with guns. We owe it to our children to stop the violence.

Third, the Omnibus Bill addresses § 22-4503 of the D.C. Official Code, which is primarily used to deter and punish offenders with a previous felony conviction who are subsequently caught in possession of a gun. This provision is commonly called the “Felon in Possession” provision. By substituting the term “firearm” for the term “pistol” in the “Felon in Possession” provision, the Bill would prohibit convicted felons, and a few other categories of persons that are identified in the current statute, from possessing all firearms--not just pistols. This is important because the term “pistol”, which is more narrowly defined than a “firearm” under D.C. law, is limited to a firearm with a barrel length of less than 12 inches. I can think of no reason why convicted felons carrying a firearm with a barrel length of 12 inches or more should not be subject to this law. Firearms that do not fit the definition of “pistol”, including assault rifles, machine guns, etc., are as dangerous as pistols and should not be possessed by convicted felons. This change is in line with the equivalent Federal law, which refers to “firearms”, and similar laws in Maryland and Virginia.

The Bill also increases the maximum penalty for a violation of the “Felon in Possession” statute to ten years, in contrast to current D.C. law, which only subjects a violator, unless he has previously been convicted under § 22-4503, to a maximum term of imprisonment of 180 days. In essence, the existing law gives violators three strikes before any significant penalty is contemplated: first, any underlying felony; second, the subsequent violation of the “Felon in Possession” provision; and finally, only on what is--at a minimum--an offender’s third crime is a serious penalty of up to ten years contemplated. Increasing the potential penalty to ten years for a first violation illustrates the seriousness with which our community views gun possession, but particularly reflects that those with a prior felony conviction present a greater risk and must be held to a higher level of accountability than a mere 180 day misdemeanor. The proposed maximum penalty of ten years for violating the D.C. statute is the same as the maximum penalty for violating the equivalent federal statutes, 18 U.S.C. §§ 922(g) and 924(a)(2). Maryland and Virginia’s laws both have maximum terms of five years.

Finally, the Bill imposes a mandatory minimum term of one year for felons in possession of a firearm, which is the same as or less than those in neighboring jurisdictions. Virginia has mandatory-minimum penalties of two years if the prior conviction was for any felony, and five years if the prior conviction was for a crime of violence. Va. Code Ann. § 18.2-308.2. Maryland's mandatory-minimum is a straight five years for possession of a firearm following conviction of a crime of violence. Md. Public Safety Code Ann. § 5-133. For those previously convicted of a drug-related felony, possession of any firearm is punishable by a five-year maximum sentence (though there is no *per se* mandatory-minimum required). Md. Crim. Law § 5-622.

It is time for the District, like its neighbors, to send a strong message to those who are plaguing our streets with guns and the violence associated with guns. For too long, the District has been a safe haven for those who carry weapons.

Title II - The Anti-Violence Against Senior Citizens Amendment Act of 2005 and  
Title XIII – Anti-Violence Against Juveniles Act of 2005

The Anti-Violence Against Senior Citizens Amendment Act of 2005 addresses the protection of our senior citizens. More than two decades ago, the Council passed the District of Columbia Theft and White Collar Crimes Act of 1982. This law provided that a defendant who committed certain offenses against persons over the age of 60 could be subject to an enhanced penalty of 1 ½ times the fine or imprisonment that was established for that offense. However, the enhancement penalty was primarily limited to financial crimes targeting senior citizens. So while the enhancement provision applies to theft, it does not apply to rape; while it applies to extortion, it does not apply to aggravated assault; and while it applies to fraud, it does not apply to murder. In 2004, there were 9 persons over the age of 60 who were victims of homicide in the District, 4 who were victims of rape, and 108 who were victims of aggravated assaults. These violent acts against our older citizens should be similarly subject to the enhancement provision of 1 ½ times the usual penalty.

Our community was recently shocked by a video tape that aired on the news showing an elderly citizen being brutally assaulted. As *The Washington Post* reported on May 5, 2005, the “security videotape ... show[ed] an 83-year-old woman being punched, kicked and stomped during a daylight robbery ... in Northwest Washington. The tape show[s] a man apparently stalking the victim, attacking her, rifling through her pockets and then walking away, leaving her on the ground.” The assailant dragged the elderly woman, punched her on top of her head and then in the face, and she fell to the ground. He later kicked the elderly woman three times in the face, followed by three more punches to her head. This incident underscores the responsibility that we have as a society to protect our senior citizens from violent attacks and graphically demonstrates the need for expanding the use of enhanced penalties. The Anti-Violence Against Senior Citizens Amendment Act of 2005 would permit enhanced penalties for any crime of violence, as defined in D.C. Official Code § 23-1331(4), that is perpetrated against our senior citizens.

The Anti-Violence Against Juveniles Act of 2005 does for children what the Anti-Violence Against Senior Citizens Amendment Act of 2005 does for our senior citizens. Currently, there is no enhancement provision designed specifically to address violent crimes perpetrated against our children; yet, children are among our most vulnerable victims. In 2004, 24 children aged 17 years or younger were victims of homicides in the District. Of these, 2 were 7 years of age and 4 were under 4 years of age. This reflects only a small portion of the children who are victims of violent crimes in the District each year. According to the U.S. Department of Justice, national crime victim surveys illustrate that juveniles are at greater risk of violent crimes than any other population. Our laws must dissuade people from preying on our children, or at the very least incapacitate those who do.

The Anti-Violence Against Juveniles Act of 2005 provides that any adult, being at least two years older than a minor, who commits a crime of violence against that minor may be punished by a fine or imprisonment of up to 1 ½ times the fine or imprisonment otherwise authorized for the offense. It would also provide for a mandatory minimum of 5 years if the crime of violence is committed while armed. Crimes of violence against children must be subject to a stiffer penalty and, when such crimes involve a firearm, we must send the strongest message possible to perpetrators and would-be-perpetrators that we simply will not tolerate such violence against our children.

### Title III - Interpreter Act Amendment Act of 2005

The purpose of amending the Interpreter Act is to ensure that statements made by non-English speaking persons who are under arrest are not excluded from evidence if the arrestee and the police speak the same language. Let me first provide some background regarding the current law before discussing why this amendment is so important.

The Interpreter Act was enacted to prevent misunderstandings between suspects and the police and to ensure that statements to police are made knowingly and voluntarily. The current law provides that "whenever a communication-impaired person is arrested and taken into custody for an alleged violation of a criminal law, the arresting officer shall procure a qualified interpreter for any custodial interrogation, warning, notification of rights, or taking of a statement." D.C. Official Code § 2-1902 (e) (2004). A "communication-impaired person" means a person whose hearing is impaired or who does not speak English. Also, "[a] 'qualified interpreter' means a person who is listed by the Officer of Interpreter Services as being skilled in the language . . . needed to communicate accurately with a communication-impaired person and who is able to translate information to and from the communication-impaired person." D.C. Official Code § 2-1901 (5) (2004). D.C. Official Code § 2-1906 provides that "communication-impaired person" may waive his or her right to an interpreter in writing.

These provisions require that an officer who has arrested and taken custody of a hearing impaired or non-English speaking person call for a qualified interpreter even if that arresting officer has the ability to "communicate accurately" with the arrested person. This statute provides for suppression of the statement if no qualified interpreter is procured and waiver of the right to an interpreter has not been shown. D.C. Official Code § 2-1902(e) provides that "[n]o answer, statement, or admission, written or oral, made by a communication-impaired person in

reply to a question of a law-enforcement officer in any criminal or delinquency proceeding may be used against that communication-impaired person unless either the answer, statement, or admission was made or elicited through a qualified interpreter and was made knowingly, voluntarily, and intelligently or, in the case of a waiver, unless the court makes a special finding upon proof by a preponderance of the evidence that the answer, statement, or admission made by the communication-impaired person was made knowingly, voluntarily, and intelligently.” Under current law, a communication impaired person’s statement is only admissible if (1) a qualified interpreter is appointed; (2) the statement is voluntary; and (3) if there is waiver of the interpreter, the court must find by preponderance of the evidence that the statement was made “knowingly, voluntarily, and intelligently.”

The existing statute’s requirement to procure a qualified interpreter or obtain a waiver, even if the arresting officer can accurately communicate with the suspect, imposes unnecessary obstacles to the admissibility of voluntary confessions. If the confession is voluntary and the officer accurately communicated with the hearing impaired or the non-English speaking suspect, the interpreter statute requires the trial court to find the statement inadmissible unless the suspect has waived the right to an interpreter. A recent District of Columbia Court of Appeals case demonstrates this problem. In *Castellon v. United States*, 864 A.2d 141, 145-46 (D.C. 2004), Mr. Castellon, who was arrested and charged with First Degree Sexual Abuse While Armed, was taken into police custody and questioned although he could not speak English. He was not provided a “qualified interpreter”, within the meaning of the statute, when he was questioned. Nonetheless, the officer who questioned Mr. Castellon was Spanish-speaking and had no difficulty communicating with him. Mr. Castellon made inculpatory statements after questioning.

The Court of Appeals held that the Interpreter Act prohibited the government from using a voluntary confession in its case-in-chief despite the fact (as the Court found) that “the officer who questioned the appellant was Spanish-speaking and had no difficulty communicating with him.” *Castellon*, 864 A.2d at 145-46. Importantly, Mr. Castellon did not have a problem understanding the Spanish-speaking officer. Neither Mr. Castellon nor his brother, who was at the scene for the questioning, ever contended that the police provided inadequate translation. To deny the police the ability to interrogate communication impaired people when they are fully qualified to do so, and to deny the government the ability to use such a voluntary confession, serves no purpose. The voluntary statement was excluded only because the interpreter statute did not contain an exception that allowed for the admissibility of a voluntary statement that was made to an arresting officer who indisputably communicated accurately with the communication-impaired person.

The Interpreter Act Amendment Act of 2005 seeks to address this problem by permitting custodial interrogations of non-English speaking suspects to be conducted without an interpreter present when the suspect is able to communicate in a language other than English with an officer who also speaks that same language fluently. It would also permit custodial interrogations of a hearing impaired person when that person and the police can communicate in writing.

This amendment to the Interpreter Act would also ensure that persons who require the use of an interpreter obtain one, while persons who do not require these services are prevented from

using the law to prevent the government from using confessions that were made knowingly, intelligently and voluntarily. The proposed amendment to § 2-1902(e) would modify the definition of a “communication-impaired person” by creating an exception. This proposed exception provides that a person is not communication-impaired if he or she is hearing-impaired and is able to communicate in writing with any other person or in sign language with a person who signs, or he or she speaks a language other than English and is able to communicate with a person who speaks the same language fluently.” This proposed exception would assure that those persons who are truly not able to communicate with the arresting officer have a right to a qualified interpreter.

Finally, the current statute also needs to be amended because it requires the “Office of Interpreter Services” to certify interpreters, although no such Office exists. The amendment would designate existing entities such as the Superior Court, the Metropolitan Police Department, and the State Department to be authorized to certify interpreters.

The Interpreter Act itself is somewhat rare insofar as surrounding jurisdictions do not have an equivalent statutory requirement that an interpreter be present during custodial interrogations by police. In fact, Maryland and Virginia only require the presence of an interpreter during actual criminal proceedings in Court. Additionally, on the certification that is required to be an interpreter, the standards are significantly less stringent than in the District. Virginia requires only that a judge appoint “an English-speaking person fluent in the language of the country of the accused.” Va. Code Ann. § 19.2-164.

It is noteworthy that California, a state with a historically large non-English speaking population, has no similar statutory requirement that an interpreter be present for custodial interrogations and has a much more flexible approach to the use of interpreters when one is required. Cal. Const, Art I § 14. In fact, California leaves the question of necessity (i.e., whether a defendant can communicate effectively in English) solely to the discretion of the trial court judge. *People v. Estany*, 210 Cal. App. 2d 609 (1962). And, despite their certification requirements, California’s court rules expressly leave open the option that non-certified interpreters may be accepted at the discretion of a trial court judge. Cal Rules of Court R 984.2. Finally, unlike the rigid approach taken in our current law, as recognized by our own Court of Appeals in *Castellon v. United States*, 864 A.2d 141 (D.C. 2004), California courts have refused to set aside convictions where non-certified interpreters have been used, concluding that there is no right to a certified interpreter, only to one who is competent. *People v. Superior Court (Almaraz)*, 89 Cal. App. 4th 1353 (2001).

#### Title IV – Assault on a Police Officer Amendment Act of 2005 and Title V - Police Protection Act of 2005

In 2004, 469 persons were arrested in the District of Columbia for assaulting a police officer (APO). Nationwide, on average, more than 57,000 law enforcement officers are assaulted each year, resulting in approximately 17,000 injuries. In 2004, a total of 153 law enforcement

officers died in the line of duty in the United States; 57 of them due to gunshots, which was the leading cause of death.<sup>2</sup> By all accounts, assaults on officers are all too frequent.

The Assault on a Police Officer Amendment Act of 2005 is aimed at protecting officers who are assaulted in the line of duty. It accomplishes this by creating appropriate crimes, with appropriate penalties, based on the nature of the assault. It is designed to deal with certain inequities in the current law by recognizing that not all assaults on police rise to a felony, and by properly penalizing those that do.

Under existing law, D.C. Official Code § 22-405, a person commits an APO when they, without justifiable and excusable cause, assault, resist, oppose, impede, intimidate, or interfere with a police officer who is performing his or her duty.<sup>3</sup> The current statute establishes two penalties: (1) APO, which carries a maximum penalty of five years and (2) APO with a deadly or dangerous weapon, which carries an enhanced maximum penalty of ten years. Both are felonies.

The current statute and corresponding penalty scheme are impractical for two reasons. First, there is no misdemeanor APO charge despite the fact that some assaults, are better characterized as misdemeanors. Second, some assaults against police officers are so egregious that they ought to qualify for an enhanced penalty, but do not under current law because the defendant did not use a deadly or dangerous weapon. Thus, on one end of the spectrum, for low-level assaults the existing law may be too harsh. On the other end of the spectrum, elements of the existing law fail to recognize certain serious assaults against the police.

On the lower end of the spectrum, prosecutors have compensated for this disparity by charging low-level APOs--such as those which involve impeding or intimidating, pushing, shoving, kicking, or even punching an officer--as regular misdemeanor simple assaults. This practice has important drawbacks. That is, while the penalty for simple assault is more in line with these lower-level APOs and the misdemeanor conviction is often more appropriate, a conviction for simple assault rather than APO fails to reflect that the assault was against a police officer. The defendant's record, quite simply, should reflect this. Indeed, police officers, prosecutors, probation officers, judges, and others should know from looking at someone's record that an assault was against a police officer. Moreover, for safety reasons, police officers

---

<sup>2</sup> Unfortunately, in the last year alone, there are numerous examples in the District of Columbia of police officers who were shot at in the line of duty. For example, in September 2004 two officers observed two males engaged in a transaction in an alley. As the officers exited their vehicle one of the subjects quickly drew a firearm and fired at least two rounds at the officers, striking their windshield. In October 2004, two officers observed a vehicle that was being operated without a front license plate. When the officers approached the vehicle the operator drove in reverse, aiming at one of the officers. The officer jumped out of the way of the vehicle. The vehicle struck the marked police cruiser and then took off.

<sup>3</sup> In addition to police officers, D.C. Official Code § 22-405 (a) also criminalizes these behaviors when they are aimed at "any designated civilian employee of the Metropolitan Police Department, any campus or university special police officer, or any officer or member of any fire department operating in the District of Columbia; or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, or any inspector, investigator, emergency medical technician, or paramedic employed by the government of the District of Columbia."

interacting with a suspect should know from his record that he has a history of assaulting law enforcement.

On the other end of the spectrum, a person who commits violent acts that injure a police officer or who creates a grave risk of injuring an officer should be treated just like those who use a deadly or dangerous weapon in the commission of an APO. People should be dissuaded from injuring or creating grave risk of injuries to police officers with or without weapons. Accordingly, the possible penalty that a person faces for a violent APO should be controlled by the risk of injury faced by the police officer, not merely upon whether a deadly or dangerous weapon was used.

The Assault on a Police Officer Amendment Act of 2005 would amend D.C. Official Code § 22-405 to create two levels of offenses: First, a misdemeanor APO offense for when the defendant's actions do not cause or create grave risk of injury. This offense would be similar to the existing APO statute, but would carry a maximum penalty of 180 days and/or a \$1,000 fine—akin to simple assault. Second, the Bill establishes a ten-year felony for conduct that results in bodily injury to an officer, when the nature of the assault creates grave risk of bodily injury to an officer, or that involves the use of any object, not just a dangerous or deadly weapon, in the commission of the assault.

The proposed bifurcation to the District's APO statute is similar to its federal counterpart, "Assaulting, resisting, or impeding certain officers or employees," 18 U.S.C. § 111. Like current District law, federal law makes it unlawful to forcibly assault, resist, oppose, impede, intimidate, or interfere with any federal government officer or employee while engaged in or on account of the performance of their official duties. Moreover, similar to the proposed amendment to the District's law, the federal statute recognizes the seriousness of the assault by distinguishing penalties. Under the federal provision, when the conduct constitutes merely simple assault, the penalty is up to one year imprisonment, while all other types of conduct are penalized by up to 8 years imprisonment. Additionally, where bodily injury occurs or a weapon is used, the federal statute has an enhancement of up to 20 years.

Virginia's law separates assaults on such individuals into those that are done with malicious intent and those that are not. Va. Code Ann. § 18.2-51.1. Like the proposed District APO statute, the Virginia statute is inclusive as to who is covered and includes a broad definition of "law enforcement officer." Moreover, under Virginia law, while bodily injury is a required element, it is reflected in the higher penalties, which include: (1) prison terms of 5-30 years with a 2 year mandatory-minimum for malicious intent assaults, and (2) 1-5 years with a 1 year mandatory minimum for those that are non-malicious.

The Assault on a Police Officer Amendment Act of 2005 also seeks to remedy other problems under the current law. For example, currently a person who assaults a community supervision officer employed by the Court Services and Offender Supervision Agency (CSOSA) cannot be charged with an APO. Similarly, while APO applies to police officers who enter the District of Columbia in hot pursuit, see D.C. Official Code § 23-901 and *Watkins v. United States*, 724 A.2d 1200 (D.C. 1999), the court has not decided whether it applies to law enforcement officers from other jurisdictions who are engaged in cross-border initiatives or other

cooperative law enforcement efforts, or who are simply in the District of Columbia and take appropriate action when they observe criminal activities. Accordingly, the Assault on a Police Officer Amendment Act of 2005 seeks to remedy these problems.

In addition to improving the laws regarding assaults on officers, the Bill further protects police officers by recognizing that the new dangers from bullets capable of penetrating a Kevlar jackets must be treated severely. Previously, ammunition with such capabilities could only be fired from rifles. Now, because such ammunition can be fired from a pistol, it has become easier for criminals to carry and conceal a weapon containing armor-penetrating ammunition. The only purpose for possessing these bullets is to kill police officers. I can imagine no lawful purpose or need for this type of ammunition. The Police Protection Act of 2005 makes it a felony to possess ammunition which, when fired from a pistol, is capable of penetrating Kevlar jackets. The Bill also enhances the penalties for possessing armor piercing ammunition to a mandatory minimum term of 7 years and a maximum term of 14 years imprisonment.

Other states have special provisions regarding this particularly threatening ammunition. For instance, Illinois prohibits possession of armor-piercing bullets (720 ILCS 5/24-3.1) and provides a penalty range of 7 to 14 years (730 ILCS 5/5-8-2). California's Penal Code § 12320 provides a 1 year, \$5,000 penalty for "knowingly possessing any handgun ammunition designed primarily to penetrate metal or armor." New Jersey Statute § 2C:39-3(f) also prohibits knowing possession of armor piercing bullets, and provides an 18-month maximum sentence upon conviction.

Under federal law, it is unlawful to transport, manufacture, sell or deliver "armor piercing ammunition," 18 U.S.C. § 922(a), which is defined as "(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium, copper, or depleted uranium; or (ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile." 18 U.S.C. § 921(a)(17)(B). Penalties for violation of this provision include a maximum prison term of up to 5 years.

Surrounding jurisdictions take different approaches. Virginia, for example, bans ammunition coated with polytetrafluorethylene, any bullets coated with a plastic substance, and those comprised of metal or a metal alloy other than lead. Va. Code Ann. § 18.2-308.3. Penalties include a term of imprisonment of not less than one year nor more than 10 years and/or a \$2,500 fine. Maryland, on the other hand, has no specific law banning armor piercing ammunition, although it does ban certain types of "assault pistols" as well as "detachable magazines." Penalties for possession of these "assault pistols," which include most semiautomatic handguns, is up to three years, except where the weapon is used in a felony, in which case the term is 5-20 years with a 5 year mandatory minimum (a second such offense carries a mandatory minimum of 10 years with a maximum term of 20 years and must run consecutive to any other felony).

#### Title VI – Enhanced Assault Amendment Act of 2005

Under current District law, prosecutors can charge an individual who assaults someone without a weapon with either Aggravated Assault or Simple Assault. There is a huge disparity between these two offenses, however, in terms of punishment, and in terms of the kind of injury needed to prove the offense. Aggravated Assault is a felony punishable by 10 years incarceration, a \$10,000 fine, or both. Simple Assault is a misdemeanor, punishable only by 180 days incarceration, a \$1,000 fine, or both. More significantly, Aggravated Assault requires “serious bodily injury”, which has been defined by the courts as an injury that involves the substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss of or impairment of the function of a bodily member, organ or mental faculty. Simple Assault, on the other hand, does not require any physical injury, but instead only requires an attempt to commit any offensive touching, no matter how slight.

The high standard for “serious bodily injury” used to prove Aggravated Assault comes from the sexual abuse statutes, not the Aggravated Assault statute itself. In a 1999 case, *Nixon v. United States*, 730 A.2d 145 (D.C. 1999), the D.C. Court of Appeals concluded that it was appropriate to use the stringent definition from the sexual abuse statutes in the absence of an express definition in the Aggravated Assault statute. Because the standard for “serious bodily injury” is so high, conduct that results in significant injuries often cannot be charged as Aggravated Assault. The *Nixon* case itself provides an example of the kind of serious conduct that falls short of establishing “serious bodily injury” for purposes of proving Aggravated Assault. The evidence in that case demonstrated that the defendant was shot and was bleeding from his shoulder. The court reversed the defendant’s conviction for Aggravated Assault, because evidence of a bleeding bullet wound, by itself, was insufficient to prove “serious bodily injury” as defined.

This high standard for serious bodily injury means that for a number of cases that involve serious assaults without a weapon, there is simply no felony charge available. For example, many assault cases involve a victim who has been seriously beaten, sometimes leaving the victim with black eyes, lacerations, broken bones, or serious bruising all over the body. The perpetrator of such an assault cannot be charged with Aggravated Assault unless the prosecution can demonstrate that the victim suffered extreme physical pain or the loss of the use of a limb or other organ for a lengthy period of time. The only alternative in such a case is to charge Simple Assault. To the victim of a serious assault, charging the case as a misdemeanor suggests that we do not take seriously, or care about, what happened to him or her. Indeed, when the victim of a serious assault understands that the charge of Simple Assault can also be charged when something as non-threatening as an offensive touching takes place, he or she accurately observes that the District’s law recognizes no distinction in the seriousness of the crime. Moreover, the maximum penalty for Simple Assault, 180 days incarceration, does not provide the court with the ability to punish the offender adequately or to appropriately deter such conduct.

According to D.C. Superior Court records, 12% of the defendants charged with and convicted of Simple Assault in 2004 received sentences of 180 days straight incarceration, the maximum possible sentence of incarceration. It is rare for such a high percentage of cases to receive the maximum penalty. As such, that statistic suggests that many serious assaults are being prosecuted as Simple Assaults. My own experience as a prosecutor supports this conclusion. The proposed amendment to the assault statute would fill the gap between

Aggravated Assault and Simple Assault by creating a low-level felony offense that covers intentional or reckless conduct, which results in bodily injury that may not amount to "serious bodily injury." The proposed legislation would amend the current assault statute, D.C. Official Code § 22-404, to create a new offense for intentionally, knowingly, or recklessly causing bodily injury to another. The proposed penalty for this new charge is imprisonment for not more than 3 years, a fine of not more than \$3,000 or both.

Maryland's approach to the crime of assault is similarly divided according to the nature of the assault, although their approach differs slightly from what is proposed here. Maryland's statute for assault in the first degree, is similar to the District's current aggravated assault law, in that it prohibits a person from intentionally causing "serious physical injury to another," Md. Criminal Law Code Ann. § 3-202. Like the District's "simple assault", Maryland's second degree assault does not require bodily injury. However, to account for the assaults that fall between those which are obvious low-level crimes and those that fall short of first-degree assault, instead of creating an "enhanced assault," Maryland has simply chosen to increase the maximum penalty for second degree assault. Thus, the equivalent of a simple assault in Maryland can carry a term of imprisonment of up to 10 years, a \$2,500 fine, or both. As a result, a sentencing judge in Maryland can take into account any aggravating factors short of "serious bodily injury" and increase the penalty accordingly.

Rather than following the Maryland model and increasing the penalty for simple assault in the District, the Bill would instead create a new crime for assaults that are more egregious than a simple assault, but which fall short of the very high requirements to convict of aggravated assault. The outcome is the same – more serious assaults that fall below Aggravated Assault could be penalized appropriately.

#### Title VII – Crime of Violence Amendment Act of 2005

The D.C. Official Code currently contains two different provisions that define the term "crime of violence." D.C. Official Code § 22-4501(f) lists crimes of violence for purposes of enhancing certain penalties. By contrast, the definition of 'crime of violence' contained in D.C. Official Code § 23-1331(4) identifies those crimes which may subject a criminal defendant to pretrial detention. While many of the crimes overlap, each provision lists several crimes that are not included in the other. For example, section 23-1331 includes only voluntary manslaughter whereas section 22-4501 includes both voluntary and involuntary manslaughter; section 23-1331 includes third degree sexual abuse, but section 22-4501 does not. While both provisions include attempts to commit the crimes listed therein, only section 23-1331 includes conspiracies to commit the enumerated crimes.

Moreover, to the extent that other sections of the Code reference one definition or the other (as is generally the case), the term "crime of violence" is ultimately not uniformly applied. For example, D.C. Official Code § 5-113.32 (records retention), § 7-2501.01 (firearms registration), § 22-1804a (three strikes law), § 22-2104.01 (eligibility for life without parole for first degree murder), § 24-408 (requirement to serve 85 percent of a sentence), among others, cross reference to section 22-4501; whereas D.C. Official Code § 7-1301.03 (civil commitment

of persons with mental retardation), § 22-1803 (penalties for attempts), and § 22-4131 (DNA testing), among others, cross reference to Section 23-1331.

An example of how this yields inconsistencies can be found in the application of the Innocence Protection Act (IPA), D.C. Official Code § 22-4131, *et seq.* Among other things, this provision provides that prior to trial for or the entry of a plea to “a crime of violence,” the defendant shall be informed of any physical evidence seized and has a right to request independent DNA testing under certain circumstances. D.C. Official Code § 22-4132. The IPA defines a “crime of violence” as those crimes listed in § 23-1331(4). Because § 23-1331(4) does not include the offense involuntary manslaughter, a person charged with involuntary manslaughter is not entitled to independent DNA testing. If, instead, § 23-4131 defined “crime of violence” as those crimes listed in § 22-4501(f), then a person charged with involuntary manslaughter would be entitled to independent DNA testing. Thus, although someone convicted of involuntary manslaughter would be deemed to have committed a crime of violence for some purposes (e.g., the three strikes law), he would not be deemed the same for purposes of his rights to independent DNA testing.

The Crime of Violence Amendment Act of 2005 would remedy this problem by creating a uniform definition for a “crime of violence.” By reconciling the offenses between the two provisions, the Bill would ensure, among other things, that:

(1) persons charged with involuntary manslaughter would be entitled to independent DNA testing. See D.C. Official Code §§ 22-4131 and 22-4132;

(2) persons convicted of third degree sexual abuse would be prohibited from registering, and therefore possessing, a firearm within the District of Columbia. See D.C. Official Code § 7-2502.03(a)(2);

(3) for purposes of seeking revocation of a defendant’s conditional release, or for purposes of detaining a defendant pending trial, there would be a rebuttable presumption that no condition or conditions can assure the safety of other persons or the community when there is probable cause to believe that the defendant committed an involuntary manslaughter while on conditional release. See D.C. Official Code § 23-1322(c)(3) and D.C. Official Code § 23-1329(b)(2); and

(4) a defendant would be eligible for an enhanced sentence under the three strikes provision after his third conviction for third degree sexual abuse. See D.C. Official Code § 22-1804a(2).

Again, these are just a few examples of the inconsistencies that would be remedied by the enactment of the Crime of Violence Amendment Act of 2005. Finally, the Act would also add Assault on a Police Officer to both definitions of a crime of violence.

For a comparison of the definitions of ‘crime of violence,’ see the attached Appendix A.

## Title VIII– Domestic Violence Amendment Act of 2005

The Domestic Violence Amendment Act of 2005 expands the definition of intrafamily offenses to permit two additional groups of individuals access to the D.C. Superior Court’s Domestic Violence Unit and the protection of Temporary and Civil Protection Orders. It also prohibits disabling communication devices to prevent others from calling the police to report crimes or child abuse. Before I discuss these changes in greater detail, let me provide some background regarding how domestic violence cases are handled and the current state of the District’s domestic violence laws.

Since 1996, the District of Columbia has addressed all misdemeanor domestic violence cases, civil protection order cases, and related child support cases in a single unit of the Superior Court called the Domestic Violence Unit. This Unit is an outgrowth of a city-wide domestic violence plan created by a number of private and public agencies.<sup>4</sup> Cases heard in the Unit are those that involve intrafamily offenses. Victims of intrafamily offenses who seek court protection benefit from a free, streamlined filing process, specially trained judges, and reduced duplication of effort between criminal and civil proceedings. Victims are able to quickly obtain temporary restraining orders and civil protection orders. The District of Columbia’s Domestic Violence Unit is considered a model in the nation.

The underlying authority for the cases heard in the Domestic Violence Unit, is, of course, the statute. District law encompasses a fairly broad definition of both “family member” and “intrafamily offense”. Under D.C. Official Code § 16-1001(5), the definition of “intrafamily offenses” includes a criminal offense committed by an offender upon a person: to whom the offender is related by blood, marriage or legal custody; or with whom the offender has a child in common; or with whom the offender shares or has shared a mutual residence; or with whom the offender maintains or maintained a romantic relationship, though not necessarily including a sexual relationship. A “family member” includes any individual who is involved in a relationship described under D.C. Official Code § 16-1001(5).

While the existing relationships covered by the statute are relatively broad, the definition fails to include two groups of persons who are similarly vulnerable to violence and are in need of the same accessible and affordable court protection. The first group includes victims of stalking. Although nationwide 77% of female and 64% of male victims know their stalker and 59% of female victims and 30% of male victims are stalked by an intimate partner, not all of the acquaintance stalkers and none of the stranger stalkers fall within our definition of an intrafamily offense.<sup>5</sup> For example, a common scenario is a stalking victim who is the romantic target of a stalker but does not want to enter a relationship with the stalker. Under existing law, this victim is not considered to be the victim of an intrafamily offense and, therefore, is not eligible for a civil protection order. Therefore, he or she must seek protection in the Superior Court’s Civil Division, where the filing fee is \$160 and where he or she may not qualify for a

---

<sup>4</sup> These include the Office of the Attorney General for the District of Columbia, the United States Attorney's Office, the Superior Court, MPD, other law enforcement agencies, local law schools, shelters, and non-profit legal service providers.

<sup>5</sup> The statistics regarding stalking were obtained from the National Victims of Crime, Stalking Resource Center’s Stalking fact sheet which is attached as Appendix B.

fee waiver. Moreover, even when a victim can pay the fee, the Civil Division lacks the expedited procedures for obtaining temporary restraining orders and civil protection orders, as well as other services afforded to victims in the Domestic Violence Unit.

The second group includes current romantic partners who are being harmed by former romantic partners, or former romantic partners who are being harmed by current romantic partners. For example, this group would include the ex-boyfriend who is victimized by the current boyfriend, or the new girlfriend who is victimized by the mother of her boyfriend's baby. The nature of the intimacy between these persons is no different from other relationships already recognized by the District's law, and requires the same streamlined, victim-sensitive process as other cases handled by the Court's Domestic Violence Unit.

This expanded definition is in accord with the definitions used by the Domestic Violence Fatality Review Board for assessing deaths that occurred as a result of domestic violence. In 2003, the Council passed the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. In Subchapter of the Act the Council expanded the definition of domestic violence for purposes of the Domestic Violence Fatality Review Board. As a result, "Domestic violence fatality" now includes a homicide where: (1) the alleged perpetrator is or was married to, divorced, or separated from, or in a romantic relationship, not necessarily including a sexual relationship, with a person who is or was married to, divorced, or separated from, or in a romantic relationship, not necessarily including a sexual relationship, with the victim; or (2) the alleged perpetrator had been stalking the victim.

In passing the 2003 legislation, the Council recognized that violence against these persons, including ex-lovers and stalkers, led to fatalities. By now expanding the definition of "intrafamily offense" in D.C. Official Code § 16-1001(5) to include these individuals, the Council would give these persons the ability to avail themselves of all the benefits associated with the Domestic Violence Unit.

The approach taken by the Bill is to add these two categories of victims to the definition of 'intrafamily' to afford them the protection offered by civil protection orders. We recognize that there are other approaches that would give these individuals the same protection without necessarily deeming these relationships to be intrafamily. The Mayor is committed to working with the Committee to find an appropriate mechanism that will ensure access to necessary protection.

The Domestic Violence Amendment Act of 2005 would also prohibit a person from disconnecting or disabling a phone or other communication device to prevent another person from reporting a crime, reporting bodily injury or property damage, requesting an ambulance, or reporting child abuse. One of the ways abusers limit their victims' ability to escape violent relationships is to isolate them from sources of help. An extreme version of this isolation tactic is to physically prevent a victim from calling 9-1-1 during a violent incident. Petitions for civil protection orders in the Domestic Violence Unit are replete with statements that the abuser prevented the victim from calling the police by pulling a telephone out of the wall, snatching a telephone out of the victim's hand or breaking a telephone to prevent its use. Simply disabling a telephone without damaging it, or keeping it away from a person trying to call for help, is not

a crime in the District of Columbia. In addition, it is not a crime for the abuser to break his or her own phone.

This provision, however, does not apply only to crimes involving domestic violence. Snatching a cellular telephone from a bystander attempting to call the police to report a street fight; blocking a person injured in a car accident from calling for help on a pay phone; or removing all of the cords from the house telephones to prevent a child's caretaker from reporting injuries noticed on a child to the Child and Family Services Agency would all be covered by this new provision. In each of these instances, a delay in reporting the situation to the authorities can lead to greater injury or harm to the victims. There are at least three states that have laws which prohibit the disabling of a communication device to prevent someone from reporting a crime. See Appendix C. This provision is important to help guarantee immediate law enforcement or medical intervention at critical junctures.<sup>6</sup>

#### Title IX– Gang Recruitment Prevention Act of 2005

Gang activity is on the rise in the District and throughout the country. While rival gang members are often the targets of gang violence, innocent citizens are literally caught in the cross fire. In fact, this was the case in the August 2003 shooting on Park Road, when a metro bus driver was shot and killed during that gang-related shootout.

Recognizing the need for a new, focused approach on gang prevention and investigation, MPD created a Gang Intelligence Unit in 2003. This dedicated group of officers has established phenomenal working relationships with community groups. They conduct all aspects of police work from school and street interventions to presenting arrest and search warrants. Last year alone the Gang Unit investigated, obtained warrants, or made arrests in over 100 cases. The unit also conducted dozens of school interventions, street interventions, and investigations.

We have learned from MPD's Gang Unit, that gang leaders go into our high schools to recruit members. Gangs have formidable power and use intimidation to both gain and retain members. These gangs include both adults and juveniles, soliciting children as young as late elementary and early middle school age. We also know that gangs have identified specific schools as "their schools" and frequently disrupt the educational process—affecting not just their own members, but other children. In addition, there are juvenile gangs that serve as feeders into the larger gangs, which enlist both adults and juveniles. Each gang has its own initiation requirements; some require the inductee to submit to a severe beating by other gang members, while other gangs require performance of various sexual acts. Once a member, the inductee is not free to leave the gang without becoming the target of violence. Day in and day out, police and prosecutors come across violence that results from gang wars, including gang activities targeted at prospective or former members of the gang or rival gang members. When a member

---

<sup>6</sup> During the mark-up process, the Committee might choose to clarify the application of, and terms used in, this Title. Specifically, language may need to be added to have this provision address the immediacy of the need to report an offense, and the circumstances under which a victim asks to use a communication device belonging to a third person.

of one gang falls, police know that the next killing will be the act of retaliation. And so, the cycle never ends.

Over the past year, a joint working group, including MPD, OAG, USAO, CSOSA and a host of other District and Federal law enforcement agencies has worked tirelessly through the Project Safe Neighborhoods program to address the issue of violence between gangs. Though we are making progress, we need better and tougher laws to help us root out gangs and prevent the recruitment of new gang members.

To address these unique problems more effectively, police and prosecutors need tools specifically targeted at gang recruitment, membership and gang-related criminal conduct. By targeting the recruitment and retention of gang members the Gang Recruitment Prevention Act of 2005 takes a major step towards curbing gang expansion and deterring the ongoing existence of gangs. The Gang Recruitment Prevention Act of 2005 makes it unlawful for a person to:

- Encourage someone to join or remain in a gang;
- Commit certain crimes as a gang member; or
- Retaliate against an individual for refusing to join or seeking to leave a gang.

The legislation takes a multifaceted approach to curb gang creation, maintenance, and illegal activities. The penalties follow this approach and increase along with the severity of the conduct. The Gang Recruitment Prevention Act of 2005 would make it a misdemeanor to recruit and sustain gang membership. The Act would create a five year felony to knowingly participate in a felony or violent misdemeanor for the benefit of the gang. Finally, the Act would create a ten year felony for a person to use or threaten to use force, coercion, or intimidation to recruit, sustain or require participation in a felony law violation or for a person to retaliate against an individual who refuses to join or participate in criminal gang activity.

The Gang Recruitment Prevention Act of 2005 fills a very specific hole in the D.C. Official Code. It creates a deterrent for those attempting to draw the District's young people into an organized criminal group and holds them accountable for criminal actions done for the benefit of the group. Moreover, it is directed at deterring the creation of groups that have organized for the sole purpose of committing crime. Often, the only reason for the crime is the existence of the gang and the only reason that the gang exists is to commit crime.

Although the District currently has aiding and abetting charges that would apply in some of the gang situations, that theory of prosecution does not address many of the issues unique to gangs. For example, it is currently not a crime to recruit young people to join a group that is organized for the purpose of committing criminal offenses. Nor is it a crime to use intimidation to prevent a gang member from leaving a gang. This is an important new offense that is critical if we are to address the underlying problem of gang recruitment. In addition, aiding and abetting carry only the same penalty as the underlying crime. Accordingly, if someone assaults another person for trying to leave a gang, the offender would be charged with simple assault—a misdemeanor. The Gang Recruitment Prevention Act of 2005 would recognize that this gang-related assault is distinguishable from others and that it should constitute a felony instead.

While it is vital that we reduce gang related crimes, it is equally important that we not infringe on our citizens' right to lawfully associate and assemble. Therefore, the definition of a criminal street gang in this Act is narrowly defined. A criminal street gang is defined as a group that conditions membership on committing or submitting to a beating or sexual act or contact or committing a crime, a group that is formed for the purpose of violating the law, or a group that, without the legal right, attempts to exclude a person from a geographic area using violence. This definition requires prosecutors to prove that in order to join the group, an individual must break the law or that the group was created for the purpose of violating a law. This definition clearly distinguishes criminal street gangs from any other law abiding group or organization.

The proposed law is similar to the Virginia law, which penalizes as a felony "any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act committed for the benefit of, at the direction of, or in association with, any criminal street gang". Va. Code Ann. § 18.2-46.1 *et seq.* Other States have similar laws. On May 10, 2005, Maryland enacted 2005 Md. Laws 313, its new gang recruitment prevention law. Nineteen other states, including, California, Florida, Illinois, and Texas have similar anti-gang recruitment provisions that seek to penalize criminal activity related to the recruitment or retention of gang members. Additionally, federal law enhances federal sentences for felonies determined to be gang-related. 18 U.S.C. § 521.

Legislation of the sort under consideration here has met with varied responses from courts, but some themes emerge clearly. If a statute is to pass constitutional muster, it must give fair warning of the conduct that is prohibited; it must require an intent to violate the law; it must not afford the police unfettered discretion in determining whom to arrest; and it must not have a chilling effect on the exercise of constitutional rights such as freedom of association.

The Gang Recruitment Act of 2005 addresses these issues by: 1) giving fair warning of the prohibited conduct by defining precise criminal activities that define a group as a criminal street gang and by describing specific criminal acts used to cause a person to join or remain in a criminal street gang; 2) requiring an intent to violate the law by prohibiting criminal conduct committed for recruitment and retention purposes, or by intentionally causing a person to become a member of a criminal street gang; 3) limiting the discretion of the police to arresting violators for specific criminal acts or the use of force to cause a person to join or remain in a criminal street gang; and 4) limiting any chilling effect upon a person's freedom of association by prohibiting only the recruitment or forced retention of members in an association that has the violation of criminal laws as one of its purposes.

#### Title X– Anti-Sexual Abuse Amendment Act of 2005

Approximately ten years ago, the D.C. Council overhauled the statutes addressing sexual abuse, updating the laws that had been in effect since 1902. That legislation significantly enhanced the ability of the government to protect the public by prosecuting sexual assaults appropriately. However, over the past 10 years, circumstances have arisen that were not anticipated when the laws were written. During that time, prosecutors charged with enforcing those statutes have observed ways in which the sexual abuse laws could be modified to ensure that the District of Columbia has the appropriate tools to respond fully to sexual abuse.

Similarly, now that the Felony Sexual Assault Statute of Limitations Amendment Act of 2004 is in effect, a gap in that statute has also been identified. Thus, the Anti-Sexual Abuse Amendment Act of 2005 focuses on persons who need additional protection from sexual exploitation, and improves the ability of the government to successfully prosecute sexual offenses, by filling in the gaps left by the Anti-Sexual Abuse Act of 1994 and the Felony Sexual Assault Statute of Limitations Amendment Act of 2004.

First let me give you a few examples of the gaps in coverage under the current sexual abuse statutes. The current law does not prohibit a high school teacher, a member of the clergy, or a coach from engaging in sexual relations with high school students who are over the age of 16. Members of these professions who seek sexual relations with youth in their care are abusing their positions of trust. The abuse of these positions of trust and the exploitation of the minors in these relationships should be unlawful.

Additionally, there have been problems successfully prosecuting persons who take advantage of inmates, group home residents, and persons with mental retardation. As one example, a girl in a home for persons with mental retardation was subjected to unwanted sexual advances by a male staff person. He was not in a supervisory or disciplinary position with respect to her since he worked on the boys' side of the home. Therefore, the most intuitively applicable charge, sexual abuse of a ward, under D.C. Official Code § 22-3013, did not apply because that charge specifically requires that the victim be "under the supervisory or disciplinary authority" of the perpetrator. Moreover, although the girl demurred, she felt that she had no choice but to do what the staff member wanted. Because she demurred, the court found that the girl was capable of appraising the nature of the conduct, declining participation in the act, and communicating unwillingness to engage in a sexual act. Therefore, second degree sexual abuse, D.C. Official Code § 22-3003, also did not apply, because that charge specifically does not apply under those circumstances.

The Anti-Sexual Abuse Act of 2005 would address these problems by expanding the list of individuals providing care or services to such patients who are precluded from engaging in sexual acts with those patients, and by removing the requirement that the individual have actual "supervisory or disciplinary authority" over the victim.

The Anti-Sexual Abuse Act of 2005 also enhances the charge of enticing a child, under D.C. Official Code § 22-3010. Currently, that charge only applies when there is physical movement of the child from one place to another; the statute applies only when the individual "takes [the] child to any place, or entices, allures, or persuades a child to go to any place." The heart of the offense, however, is not intended to be the moving of a child from one place to another, but rather the act of enticing the child to engage in a sexual act. As the law is currently written, those cases involving predators who do not actually physically move the child from one place to another cannot be charged with enticing. The Bill addresses that problem by making it unlawful to seduce, invite, allure or persuade a child or minor to engage in sexual activity. The Bill also enhances law enforcement's ability to apprehend child molesters, and prevent child sexual abuse, by making it explicitly unlawful to seduce, invite, allure or persuade an individual that the person believes is a child or minor to engage in sexual activity.

Finally, last year, new statutes of limitations were enacted by the Council for sexual offenses. However, through an oversight, the statute of limitations for crimes that logically and frequently accompany sex offenses --such as burglary, robbery, and kidnapping -- were not similarly enlarged. This means that six years after the crimes were committed, a person could be prosecuted only for the sex offenses and not for other crimes that occurred in the same event. If there is sufficient evidence to prove the sex charges, there should be sufficient evidence to prove these related offenses as well. Thus, it makes sense to extend the statute of limitations for other crimes that are properly joinable with a sex offense.

For example, consider a case where a woman is kidnapped, taken to a secluded location, beaten, raped and then robbed--all by the same individual. Six and a half years later, through DNA or other evidence, the identity of her attacker is determined. As an initial matter, charging that individual only with the sex offense fails to capture the true nature of the criminal conduct. Imagine the victim's reaction when she learns that despite all that was done to her, and despite the fact that she must relive the entire experience when testifying and preparing to testify, the only aspect of that horrifying experience that the government can prosecute is the sex offense. Moreover, charging only the sex offense could be confusing to a jury, who will not hear about the statute of limitations issue, and who will naturally wonder why they are being asked to decide guilt or innocence with respect to charges that relate to only a portion of what occurred. Additionally, the court would be limited to sentencing on the sexual abuse charge alone, because no other crimes could be charged. Finally, but importantly, the defendant's criminal record after conviction would simply not accurately reflect the scope of the conduct he committed.

Title XI – Reports of Neglected Children Amendment Act of 2005  
and Title XII – Mandatory Reporting of Child Victimization Act of 2005

Each year thousands of the District's children are the victims of abuse, neglect, or a crime. According to the U.S. Department of Justice, national crime victim surveys indicate that most crimes against juveniles are not reported to the police. The law must and can do more to protect children. To this end, the Mayor's Bill includes two titles designed to improve the reporting of child abuse and neglect, and to require that specified persons report when a child has been the victim of certain crimes.

The Reports of Neglected Children Amendment Act of 2005 would expand the list of individuals who are required to report suspected child abuse and neglect, close loopholes that prevent prosecution of mandatory reporters who fail to report suspected neglect and abuse, and increase the criminal penalty for failure to report suspected child neglect and abuse. In addition, the Mandatory Reporting of Child Victimization Act of 2005 would require the same mandated reporters to notify law enforcement when they observe children who have been the victim of certain crimes or with certain injuries.

Currently, under D.C. Official Code § 4-1321.02, the following persons are designated as mandatory reporters of child abuse and neglect: every physician, psychologist, medical examiner, dentist, chiropractor, registered nurse, licensed practical nurse, person involved in the care and treatment of patients, law-enforcement officer, school official, teacher, social service

worker, day care worker, and mental health professional.<sup>7</sup> This list of mandatory reporters is too narrow. It overlooks a number of individuals who in their professional or official capacity come into contact with, and have considerable responsibility for, assuring the safety of our children. For example: athletic coaches, Department of Parks and Recreation employees, public housing resident managers, certain Child and Family Services Agency employees, agents and contractors (who are not social workers or clinical staff), and school employees other than teachers. For the District to protect neglected and abused children it must first have information that the children are threatened. Individuals who routinely come into contact with and are responsible for the care of children are more likely to observe injuries or become privy to information that should trigger a further investigation.

The expanded list of mandatory reporters proposed by the Reports of Neglected Children Amendment Act of 2005 is well within the mainstream of other states. This proposed amendment is only a moderate expansion of the current law and many others states have similar requirements.<sup>8</sup> Virginia has a mandatory reporting requirement for abuse and neglect that includes medical practitioners, hospital medical residents, medical interns, nurses, social workers, probation officers, teachers or anyone employed by a public or private school, child-care providers, Christian Science practitioners, mental health professionals, law enforcement officers, mediators, and a catch-all provision for anyone associated with a public or private organization responsible for the care of children. Va. Code Ann. § 63.2-1509. Like the proposed amendment, Virginia's law also appears intended to cover the entire realm of those who are likely to come into contact with children.

In addition to expanding the list of mandatory reporters, the Act would make other important changes to current law. For example, under the existing law, mandatory reporters are required to report when they have "reasonable cause to suspect" neglect. That term, however, has proved ambiguous and therefore made the law difficult to enforce. For example, when a mandatory reporter does not believe the child or witness who has made a claim of abuse or neglect, the mandatory reporter arguably does not have "reasonable cause to suspect" neglect and therefore asserts that he or she was not required to make a report. My Office routinely

---

<sup>7</sup> Pursuant to D.C. Official Code § 4-1321.02 (d), in addition to the persons named above, "any health professional licensed pursuant to Chapter 12 of Title 3, or a law enforcement officer, except an undercover officer whose identity or investigation might be jeopardized, shall report immediately, in writing, to the Child Protective Services Division of the Department of Human Services, that the law enforcement officer or health professional has reasonable cause to believe that a child is abused as a result of inadequate care, control, or subsistence in the home environment due to exposure to drug-related activity."

<sup>8</sup> For example, in Oregon mandatory reporters include: a physician, including any intern or resident; dentist; school employee; licensed practical nurse or registered nurse; employee of the Department of Human Services, State Commission on Children and Families, Child Care Division of the Employment Department, the Oregon Youth Authority, a county health department, a community mental health and developmental disabilities program, a county juvenile department, a licensed child-caring agency or an alcohol and drug treatment program; peace officer; psychologist; member of the clergy; licensed clinical social worker; optometrist; chiropractor; certified provider of foster care or an employee thereof; attorney; naturopathic physician; licensed professional counselor; licensed marriage and family therapist; firefighter or emergency medical technician; court appointed special advocate; registered child care provider; and member of the legislative assembly. Oregon 419B.005 and 419B.010. Examples of other states that have adopted similar definitions of mandatory reporters include Kansas, Kansas Stat. Ann. 38-1522; Connecticut, Conn. Gen. Stat. § 17a-101; Colorado, C.R.S. 19-3-304; and Illinois, 325 ILCS 5/4.

prosecutes cases involving abuse or neglect of children that should have been reported long before they were ultimately discovered. In many of these cases, the suspected abuse or neglect should have been reported sooner, but someone failed to do so claiming that they did not believe what the child had told them.

To rectify this, the Reports of Neglected Children Amendment Act of 2005 requires the making of a report any time a mandatory reporter is told by a child or a witness that the child has been abused or neglected, whether or not the person believes the child or witness. Mandatory reporters must be precluded from allowing their personal credibility determinations from thwarting the mandatory nature of the reporting statute. Only trained CFSA investigators and law enforcement officers should conduct child neglect investigations and determine whether children have been abused or neglected.

The Mayor has also proposed the Mandatory Reporting of Child Victimization Act of 2005. This new law is designed to fill a gap in the existing reporting requirements pertaining to child victimization. Currently, a mandatory reporter must only report when a child has been neglected or abused by a caretaker, parent or guardian. There is no existing requirement that a mandatory reporter notify authorities when a child has been the victim of a crime by someone who is not a caretaker. For example, a teacher who learns that a fourteen-year-old student was raped by a stranger, or even by someone she knows who is not a caretaker, is not required to report the rape if the victim's caretaker was not neglectful. In this scenario, the victim would not receive needed services and the perpetrator would not be brought to the attention of the authorities.

The Mandatory Reporting of Child Victimization Act of 2005 is designed to expand the current law by including the requirement that specific mandated reporters be required to report certain crimes or injuries beyond the narrow scope of those which constitute child abuse or neglect. The Act would require that the same individuals who are designated as mandatory reporters of neglect and abuse also report when they suspect that a child: (1) was the victim of "sexual abuse or attempted sexual abuse," as defined in D.C. Official Code §§ 22-3002 through 22-3018; (2) was assisted, supported, caused, encouraged, commanded, enabled, induced, facilitated, or permitted to become a prostitute, in violation of D.C. Official Code §§ 22-2701, *et seq.*; (3) has an injury caused by a bullet; or (4) has an injury caused by a knife or other sharp object which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given of the injury.<sup>9</sup>

This relatively narrow expansion of the District's existing mandated reporter law is an important step in providing additional protection for our children who have been seriously victimized, but are not necessarily abused or neglected. The Bill is carefully tailored to apply

---

<sup>9</sup> Oregon mandatory reporters must report, "Any assault,...including any injury which appears to be at variance with the explanation given of the injury...Rape of a child, which includes but is not limited to rape, sodomy, unlawful sexual penetration and incest...sexual abuse... sexual exploitation, allowing, permitting, encouraging or hiring a child to engage in prostitution..." The Arizona law includes inflicting or allowing sexual abuse pursuant to § 13-1404, sexual conduct with a minor pursuant to § 13-1405, sexual assault pursuant to § 13-1406, molestation of a child pursuant to § 13-1410, commercial sexual exploitation of a minor pursuant to § 13-3552, sexual exploitation of a minor pursuant to § 13-3553, incest pursuant to § 13-3608 or child prostitution pursuant to § 13-3212.

only to those who are routinely entrusted with the care of children and it is limited in the types of crimes or injuries that must be reported in order to ensure that the most egregious crimes against children do not go unreported.

#### Title XIV – Contributing to the Delinquency of a Minor Act of 2005

The District does not have a law that prohibits contributing to the delinquency of a minor. Most states have laws that hold adults, including parents, accountable for encouraging children to engage in criminal activities.<sup>10</sup> Virginia's statute, Va. Code Ann. § 18.2-371 (2004), is a good example of what contributing to the delinquency of minor laws generally prohibit. It provides in part that "[a]ny person 18 years of age or older, including the parent of any child, who (i) willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected . . . engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild, shall be guilty of a Class 1 misdemeanor."

These laws are also passed in part as a way to shield children from gang influence. For example, Virginia has a statute that I mentioned earlier, Va. Code Ann § 18.2-46.3, which makes it a felony for any person age 18 years or older to solicit, invite, recruit, encourage or otherwise cause or attempt to cause a juvenile to actively participate in or become a member of what he knows to be a criminal street gang.

Other than D.C. Official Code § 48-904.07,<sup>11</sup> which prohibits enlisting minors to distribute drugs, there are no penalties to deter individuals who deliberately encourage minors to commit delinquency and status offenses.<sup>12</sup> The proposed law will bring our code up to date and create meaningful disincentives for adults who would lead our children to commit a crime.

Surprisingly, it is not currently illegal for a person to harbor a juvenile who has run away from his or her parent or is in abscondence from a court ordered placement. Adults in this

---

<sup>10</sup> States that have contributing to the delinquency of a minor statutes include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, New Hampshire, New Mexico, New York Ohio, Oklahoma, Rhode Island, South Carolina, Utah, and Virginia. The proposed law was taken from different portions of those state statutes. Maryland's statute is very similar to the proposed law. Maryland Courts and Judicial Proceedings 3-8A-30 provides "It is unlawful for an adult wilfully to contribute to, encourage, cause or tend to cause any act, omission or condition which results in a violation, renders a child delinquent or in need of supervision."

<sup>11</sup> D.C. Official Code § 48-904.07 provides that:

(a) Any person who is 21 years of age or over and who enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance, in violation of § 48-904.01(a), for the profit or benefit of such person who enlists, hires, contracts, or encourages this criminal activity shall be punished for sale or distribution in the same manner as if that person directly sold or distributed the controlled substance.

(b) Anyone found guilty of subsection (a) of this section shall be subject to the following additional penalties:

(1) Upon a first conviction the party may be imprisoned for not more than 10 years, fined not more than \$ 10,000, or both;

(2) Upon a second or subsequent conviction, the party may be imprisoned for not more than 20 years, fined not more than \$ 20,000, or both.

<sup>12</sup> A status offense is an offense that is unique to children. In the District, status offenses include violations of the curfew law, truancy, and habitual runaway.

jurisdiction have long known that they have nothing to lose by trying to convince their younger brothers, sisters, or neighbors that they should carry the drugs and guns, or commit violent offenses, so the adult could avoid criminal exposure knowing that the juvenile's exposure is limited to their 21<sup>st</sup> birthday. For many of our youth, this recruitment by adults marks the beginning of what will eventually be a lifetime of criminal activity. Perhaps worse, for far too many children this recruitment places them in harm's way.

The Contributing to the Delinquency of a Minor Act of 2005 criminalizes traditional ways that adults encourage youth to break the law. It accomplishes this by making it unlawful for any person over 18, who is at least two years older than a minor, to cause or encourage the minor to commit a crime, be truant, possess or consume drugs or alcohol, run away from home, violate a court order or join a gang. Both Virginia, Va. Code Ann. § 18.2-371, and Maryland, Maryland Courts and Judicial Proceedings 3-8A-30, have statutes that proscribe similar conduct. Other states have enacted similar statutes. For instance California's law, like the proposed title, expressly prohibits encouraging a child to run away from home. Cal. Pen. Code § 272. Alaska's law, like the proposed title, also includes truancy and goes even further by including a provision that prohibits minors from being in the immediate physical presence of the unlawful manufacture, use, display, or delivery of a controlled substance. Alaska Stat. § 11.51.130. Colorado includes the provision against encouraging a child to violate a court order. C.R.S. 18-6-701. Ohio, with perhaps the most restrictive law, makes it illegal to encourage a child to be "unruly," a term which is elsewhere defined to include truancy, habitual disobedience to parents and teachers, and misbehavior that injures or endangers the child's own "health or morals or the health or morals of others." ORC Ann. 2919.24 and ORC Ann. 2151.022. While the proposed Act includes status offenses, it does not go as far as the Ohio law.

The penalties in the proposed law vary according to the activity that is encouraged, and the penalties are enhanced for repeat offenders and for conduct that results in bodily injury or death to any person. If an adult contributes to the delinquency of a minor by encouraging him or her to commit one of the crimes in listed in section 1402(a) (1-5), the maximum punishment for the first offense is a \$1,000 fine and imprisonment for not more than 180 days. The offenses listed in section 1402(a) (1-5) are truancy, possession a controlled substance, running away from the home of the parents, guardian or other custodian, violation a court order or commission of a misdemeanor. If there has been a previous conviction under those sections, the maximum penalty is raised to a fine of \$3,000 and imprisonment for not more than 3 years. Also, if the adult commits a section 1402(a)(1-5) violation and the juvenile's crime caused \$250 or more in damage to property, the maximum penalty rises to a fine of \$5,000 and imprisonment for not more than 5 years.

If an adult contributes to the delinquency of a minor by encouraging him or her to commit a felony or to join a gang as defined in section 1402(a)(7), the maximum punishment for the first offense is a \$5,000 fine and imprisonment for not more than 5 years. If bodily injury of a minor or any other person is caused by a violation of section 1402(a), the maximum penalty is a fine of \$10,000 and imprisonment for not more than 10 years. If a death of a minor or any other person is caused by a violation of section 1402(a), the maximum penalty is a fine of \$30,000 and imprisonment for not more than 30 years.

The misdemeanor offense would be prosecuted by OAG and the felony offense would be prosecuted by the USAO. The rationale for this bifurcated system of prosecution is based on the likelihood that OAG would be involved in the criminal and/or civil prosecution of most of the underlying offenses that would give rise to a misdemeanor violation of this Act, while the USAO is better situated to prosecute the felony violations.

This jurisdiction does have an Aiding and Abetting statute, D.C. Official Code § 22-1805, that allows prosecution of a person where (1) an offense was committed by someone, (2) the accused participated in the commission, and (3) he did so with guilty knowledge. In sum, an aider and abettor "in some sort associate[s] himself with the venture...participate[s] in it as in something that he wishes to bring about, . . . and seek[s] by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Aiding and abetting, however, is not enough to cover these types of situations the Contributing to the Delinquency of Minor is designed to address. The Aiding and Abetting statute does not allow for the prosecution of an adult who encourages the juvenile to commit status offenses. It also does not address the situation where the adult encourages a minor to commit a crime, but whose actual participation in the crime itself is insufficient to support an aiding and abetting theory.

#### Title XV – Government Appeals Amendment Act of 2005

Under existing law, a defendant in an adult criminal case, or a respondent in a juvenile delinquency matter, has an immediate right to appeal an order denying a new trial. In contrast, the government cannot appeal a decision to grant a new trial until after the cost and burden of the new trial have been incurred. The Government Appeals Amendment Act of 2005 would permit the government to appeal a trial court order granting a new trial, thus giving both the defense and the government the right to appeal from a decision regarding whether a new trial should be held.

This authority is necessary for two main reasons: (1) to eliminate the cost and burden of a new trial when the Court of Appeals may ultimately determine that a new trial is not required and (2) to put the government on equal footing with a defendant and a respondent who currently have the right to appeal a denial of a new trial immediately.

The proposed amendment would permit an appeal by the USAO or OAG of a trial court order granting a new trial after verdict or judgment, unless prohibited by the double jeopardy clause of the United States Constitution.<sup>13</sup> A successful appeal of an order granting a new trial will reduce the number of cases that have to be retried, thus reducing:

- Litigation costs for prosecutors, police and the court;
- Wasted court time; and

---

<sup>13</sup> The federal government appeal statute allows the United States to appeal orders in U.S. District Court granting new trials and orders that release the defendants, modify conditions of release, or deny motions to revoke release decisions. See 18 USCS § 3731. The proposed amendment's language comes from the federal statute and would permit the USAO and OAG to appeal orders granting new trials in Superior Court adult and juvenile matters. In addition to the federal statute granting this right of appeal, at least 9 states have enacted laws permitting government appeals of orders granting new trials. Those states include California, Texas, Florida, Colorado, and North Carolina.

- Inconvenience and trauma suffered by witnesses who have to participate in multiple trials involving the same defendants or respondents.

The Government Appeals Amendment Act of 2005 would also permit OAG to appeal adult and juvenile release orders, orders denying a motion for revocation of probation, and orders modifying conditions of release. Under current law, the OAG does not have the right to appeal a trial court's order releasing an adult notwithstanding that, pursuant to D.C. Official Code § 23-1324, the USAO has the statutory right to appeal release, modification and revocation decisions for adult defendants in Superior Court. This provision of the Bill places OAG on equal footing with the USAO.

Similarly, the OAG is precluded from seeking review of a juvenile detention decision based upon considerations of public safety. As a result, a dangerous juvenile may remain on the streets pending a trial and OAG cannot seek an appeal if prosecutors believe that the release was done in error. This proposed provision of the Act puts OAG on equal footing with the juvenile respondent, who has a right to an interlocutory appeal of a detention decision pursuant to D.C. Official Code § 16-2328.

#### Title XVI – Juvenile Failure to Appear Offense Act of 2005

In January of 2004, I testified in support of Bill 15-537, the Mayor's Omnibus Juvenile Justice legislation that was then pending before this Committee. As you know, that Omnibus legislation included the Juvenile Failure to Appear Offense Act, which was later removed from the final version of the Act in a 7 to 6 vote at the bill's second reading. The Juvenile Failure to Appear Act was important more than a year ago when it was first introduced and it remains just as important today.

Now, more than a year-and-a-half after the Mayor's Juvenile Justice Bill was first introduced and months after the Juvenile Justice Act has gone into effect without the failure to appear provision, juveniles continue to fail to appear for their court cases at an alarming rate. As of May 5, 2005, there were approximately 128 custody orders (juvenile arrest warrants) outstanding for juveniles who failed to appear for hearings. As I testified in the past, the City cannot provide care and rehabilitation to youth unless, at the very least, they appear at court.

The Administration continues to support the Failure to Appear Act as a most basic and fundamental element in our effort to prevent youth from further criminal involvement. Indeed, children must learn about responsibility and accountability or we will have set them up for a lifetime of failure. They must understand the importance of appearing for court hearings, or they learn that the court is not something to be taken seriously.

Youth must know that there are swift, sure, and predictable consequences for their failure to take their delinquency matters—and the court--seriously. In addition, the many police officers, crime victims, court personnel and others who are inconvenienced, often at cost to the government, should know that when the accused fails to appear in court, he or she will be held accountable.

As this Committee well knows, if an adult fails to appear for his or her criminal court appearance, he or she faces a separate misdemeanor or felony charge. This is as it should be. Court obligations and court orders must be respected for the criminal justice system to work. But there is no similar legal consequence for juveniles. An 18 year old faces criminal charges when she fails to appear in court while her 17 year old sister has no such sanction. We do a disservice to the 17 year old who knows nothing of the existence of the failure to appear charge, but who eventually learns all about this “new” offense when he turns 18 and fails to appear in court.

About eight months ago a former attorney from my Office who is now an Assistant U.S. Attorney conveyed a conversation that took place between a Superior Court Criminal Judge and a young man who had recently been convicted as a young adult after a lengthy juvenile history. Upon sentencing this young man, the Judge said that he had been done a disservice in the juvenile system, where he failed to learn the basic concept that inappropriate conduct results in consequences. The Judge explained that it was now too late for him to learn that lesson because the adult system exists to protect, not to rehabilitate. Indeed, for that young man, and many others, our juvenile justice system fails our youth by not emphasizing these lessons early—when rehabilitation is the focus.

Beyond establishing a sanction, the Failure to Appear Act creates a presumption that a child who fails to appear for a delinquency hearing is in need of care or rehabilitation. That is another reason why this proposal is so important. It allows the court or judicial officer to speed the delivery of support services to youth in need.

One of the reasons cited by those opposed to this provision is that the creation of a separate offense for failure to appear would result in a cadre of youth inappropriately placed at Oak Hill. This is a myth. There is nothing in this provision that would require a Judge to place a juvenile who is charged with or convicted of failure to appear at Oak Hill. As with all offenses in our juvenile justice system, judges remain free to determine a pre-trial placement or enter a post-adjudication disposition that reflects the level of services that are needed for the youth. While the nature of the underlying offenses may play a role in a judge’s decision, there are no offenses in our juvenile system that mandate a particular placement by a judge. The same is true of the failure to appear offense.

Another reason cited by some who opposed this provision in 2004 was that juveniles miss court dates for a variety of non-criminal reasons. The Failure to Appear Act accommodates scenarios in which a juvenile's failure to appear is not found to be willful. Under this proposed law, a juvenile whose absence at a delinquency hearing was not willful, is not guilty of committing this offense.

Other states have adopted a law similar to this. For example, both Minnesota<sup>14</sup> and Washington State have enacted provisions to make the failure to appear by a juvenile at a delinquency proceeding a separate crime. Minnesota’s provision makes the failure to appear a misdemeanor if the underlying crime was a misdemeanor, and a felony if the underlying crime

---

<sup>14</sup> Notably, many of those opposed to such a law in the District tout the Minnesota juvenile justice system.

was a felony. Washington's provision makes any failure to appear by a juvenile a violation of its bail jumping statute.

The Mayor is well aware that there are other – non-criminal – approaches to encouraging juveniles to appear in court. Indeed, the Mayor strongly supports the efforts being made by the Department of Youth Rehabilitation Services and its Director to develop systems to remind juveniles of their court dates. To the extent that these measures are successful, more juveniles will appear in court and fewer would be charged with failure to appear. But the Administration feels strongly that there needs to be an affirmative disincentive for ignoring serious court obligations. Front end efforts by DYRS and this legislation are not mutually exclusive. Indeed, in the Mayor's view they are appropriately complementary.

#### Title XVII – Unlawful Entry On Vacant Property Amendment Act of 2005

Although the District has made significant advances in recent years in reducing the problems associated with vacant and nuisance properties, more still needs to be done. The Unlawful Entry On Vacant Property Amendment Act of 2005 makes litigation of the crime of unlawful entry more efficient for prosecutors, reduces the penalty for defendants, and clarifies existing case law.

On May 11, 2005, there were 1,994 vacant properties listed in the DCRA Vacant Property Database, any of which can be an attractive nuisance for illegal activity by unlawful occupants.<sup>15</sup> Even after owners attempt to secure their vacant buildings by boarding them up, people still break into the buildings and use them for illegal purposes. The illegal purposes can include activities such as using or selling drugs. In those cases, an officer can make an arrest based upon probable cause for drug activity. However, if an unlawful occupant is not actively engaged in illegal activities and is only caught in the building, the officer may not have probable cause for an arrest. Vacant properties are often not safe and pose health risks to those unlawful occupants. Vacant buildings may be structurally unsound and dangerous to occupy. Vacant buildings are often unsanitary; many do not have running water, heat, or electricity. In addition, unlawful occupants sometimes set fires to stay warm, which can create a serious risk to themselves and persons living in the neighboring buildings.

Under the current Unlawful Entry statute, an owner or a person in legal possession of the property must make a demand that the police remove the unlawful occupant from the building. D.C. Official Code § 22-3302. In other words, the owner must tell the officer that he or she does not want the unlawful occupant in his or her building. The Standard Criminal Jury Instruction describes the requirement as being “against the will” of the owner. Std. Crim. Jury Inst. 4.36. This would mean that the police officer would have to contact the owner or person lawfully in charge of the building, usually in the middle of the night when many of these offenses occur. Often, the police officer cannot identify or contact the owner of the property while on the scene with an apparent trespasser.

---

<sup>15</sup> See [http://dcra.dc.gov/dcra/cwp/view,a,3,q,625194,dcraNav\\_GID,1691,dcraNav,\[33420\].asp](http://dcra.dc.gov/dcra/cwp/view,a,3,q,625194,dcraNav_GID,1691,dcraNav,[33420].asp) for the Department of Consumer Affairs Vacant Property list.

The Unlawful Entry On Vacant Property Amendment Act of 2005, makes arresting unlawful occupants more efficient by establishing *prima facie* evidence that the entry is against the will of the owner if the building is boarded, otherwise secured, or has “no trespassing” signs posted. In addition, the Act clarifies existing case law, which has held that an owner’s will that other people stay off of his or her property need not be expressed orally and that a sign warning visitors is sufficient. *Smith v. United States*, 281 A.2d 438 (D.C. 1971); *Artisst v. United States*, 554 A.2d 327 (D.C. 1989).

When a person in legal possession of vacant property has boarded up the doors and windows of the property, he or she has “expressly warned intruders [to stay] away from [the] property.” *Id.* Any person who sees a building that is boarded or otherwise secured or which has a no trespassing sign posted is put on notice that the owner of the property does not want them to enter the building.<sup>16</sup> The Bill codifies this caselaw and makes it clear that the officer has probable cause to arrest the unlawful entrant because the owner has already expressed his or her intent to keep people out.

The proposed amendment is similar to provisions found in New York, Pennsylvania, and Florida law, which make it unlawful to enter real property which is fenced or “otherwise enclosed” in a manner manifestly designed to exclude others. Clearly the boarding of a vacant building is manifestly designed to exclude others. The Florida law also makes the entry on to property that is enclosed and posted *prima facie* evidence of unlawful entry.

Finally, the Unlawful Entry On Vacant Property Amendment Act of 2005 reduces the existing penalty from 6 months to 180 days. In addition to being a reduction in time, this change will eliminate this crime from those which are subject to a jury demand, allowing these cases to be handled more expeditiously.

#### Title XVIII – Vehicle Identification Numbers Tampering and Theft Prohibition Act of 2005

Although the number of stolen cars in the District fell slightly last year from the year before, cars are still being stolen at an alarming rate. According to MPD, 8,136 cars were stolen in 2004. Several serious accidents over the past few years heightened public awareness regarding “kiddy car thieves” and the dangers presented by juvenile drivers. However, the problem with auto thefts in the District is not just limited to instances of juvenile “joy riding.” Another, much more lucrative side of auto theft exists in the District. This involves “chop shops,” vehicle resale, and insurance fraud.

Experienced auto thieves steal high-end cars, construction equipment, and popular make and model cars. These thieves then “reVIN” the stolen car by altering the vehicle’s unique identification number (“VIN number”). The thief obtains a new title to the vehicle and registers the vehicle with DMV using the new, falsified VIN number. The new documents list a fictitious person with a false address, making it extremely difficult for law enforcement officers or insurance companies to trace. The thief then can readily sell the vehicle or its parts in the open

---

<sup>16</sup> For purposes of notice it should not matter whether the owner imperfectly sealed the building, allowing the trespasser easier access, or completely boarded and bricked the building, forcing the trespasser to exert more effort to gain access.

market to unsuspecting citizens. The Vehicle Identification Numbers Tampering and Theft Prohibition Act of 2005 addresses these issues by making it illegal to knowingly remove, obliterate, tamper with or alter the identification number of a motor vehicle or any of its parts.

Title XVIII of the Omnibus Bill is similar to the federal offense, which criminalizes altering or removing motor vehicle identification numbers.<sup>17</sup> Under the provisions of this proposed title, a person who knowingly removes, obliterates, tampers with, or alters any identification number will be guilty of a misdemeanor if the value of the motor vehicle or motor vehicle part is less than \$250 and, upon conviction, would be imprisoned for not more than 180 days, or fined not more than \$1,000, or both. The offender would be guilty of a felony if the value of the motor vehicle or motor vehicle part is \$250 or more and, upon conviction, be subject to imprisonment for not more than 5 years, or fined not more than \$5,000, or both.

In addition to the federal law, Virginia and Maryland have enacted provisions prohibiting the altering or removal of vehicle identification numbers from automobile parts. Another 21 states, including California, New York, Illinois, Michigan, and Pennsylvania have similar provisions.

While the downward trend in auto thefts in the District is encouraging, 8,136 stolen cars are entirely too many. We must, therefore, join with our neighboring jurisdictions to address this problem as aggressively as we can.

#### Title XIX – Motor Vehicle and Drug Offense Driving Privileges Revocation and Disqualification Amendment Act of 2005

As I discussed briefly above, more needs to be done to deter people from stealing cars, driving dangerously, and otherwise using motor vehicles in the commission of crimes. In the past two years we have seen far too many people injured or killed as the result of an adult or juvenile driving recklessly in a stolen car. In addition to criminalizing certain behaviors, current District law also mandates that convictions for certain crimes be punished with the temporary or permanent loss of driving privileges. For many, the fear of losing their license, or fear of being unable to attain one when they reach the eligible age, is a powerful deterrent. The Motor Vehicle and Drug Offense Driving Privileges Revocation and Disqualification Amendment Act of 2005 recognizes this deterrent effect and seeks to expand the offenses that would result in the temporary suspension or permanent revocation of driving privileges, or, in the case of a juvenile or someone unlicensed, that would result in the temporary delay of their eligibility to obtain a license.

---

<sup>17</sup> 18 USCS § 511 - Altering or removing motor vehicle identification numbers, provides that

(a) A person who--

(1) knowingly removes, obliterates, tampers with, or alters an identification number for a motor vehicle or motor vehicle part; or

(2) with intent to further the theft of a motor vehicle, knowingly removes, obliterates, tampers with, or alters a decal or device affixed to a motor vehicle pursuant to the Motor Vehicle Theft Prevention Act, shall be fined under this title, imprisoned not more than 5 years, or both.

Currently, under D.C. Official Code § 50-1403.02, the Mayor is authorized to revoke the driver's license of a person who is convicted as an adult, or adjudicated a delinquent, as a result of the commission of a drug offense. That statute also permits the delay in the issuance of a license for someone who did not have a license to drive when they were convicted of the drug offense. According to the DMV, it routinely receives conviction information from the court regarding adults, and it routinely seeks to revoke their licenses based on drug convictions. While this has not been the case for juveniles, the DMV has recently reached out to the Court in an effort to obtain the adjudication information so it can enforce the existing law.

Similar to a Virginia law, the Motor Vehicle and Drug Offense Driving Privileges Revocation and Disqualification Amendment Act of 2005 would expand the list of charges that could lead to a revocation of, or disqualify a person from obtaining, a driver's license. Specifically, a conviction for any of the following offenses could lead to license revocation:

- The commission of a drug offense.
- The commission of a stolen vehicle offense.
- Failure to yield to a pedestrian (D.C. Official Code § 50-2201.28).
- Failure to obey a traffic order while operating a motor vehicle (18 DCMR 2000).
- Fleeing police and any substantially identical successor law.

In addition, a person who does not have a driver's license, including a juvenile, may be delayed in obtaining one if they are convicted of one of the foregoing offenses or any of the following:

- Reckless driving (D.C. Official Code § 50-2201.04).
- Leaving after colliding – personal injury (D.C. Official Code § 50-2201.05(a)).
- Operating without a permit (D.C. Official Code § 50-1401.01(d)) or (D.C. Official Code § 50-1401.02(i)) (non-residents).
- Driving while intoxicated and driving under the influence (D.C. Official Code § 50-2201.05(b)(1)).
- Operating while impaired (D.C. Official Code § 50-2201.05(b)(2)).
- Operating vehicle after revocation or suspension of operator's Permit (D.C. Official Code § 50-1403.01).
- Speeding 30 miles per hour in excess of the limit (18 DCMR 2200.12).

Title XX – Anti-Prostitution Amendment Act of 2005  
and Title XXI – Prostitution Free Zone Act of 2005

The Anti-Prostitution Amendment Act of 2005 and the Prostitution Free Zone Act of 2005 target the prostitution trade. Taken together, these Acts establish the crime of prostitution, enhance the penalties for persuading or compelling youth to become prostitutes, and enable the police to crack down on areas that are blighted by prostitution.

Currently, the act of prostitution is not a crime in the District. Prostitutes are charged with Solicitation of Prostitution.<sup>18</sup> The Anti-Prostitution Amendment Act of 2005 makes it unlawful for any person to engage in, or solicit for, prostitution and defines the terms “prostitution,” “arranging for prostitution,” and “soliciting for prostitution.” The current law allows law enforcement to make arrests in the most common scenarios, i.e., where an undercover officer is solicited, or where an officer hears an explicit solicitation of someone else. However, in those cases where individuals are found engaging in the act of prostitution, after any negotiation for the act has taken place, there is currently no appropriate charge. In effect, there is a penalty for attempting to engage in prostitution, but not for successfully doing so. Thus, ironically, the law as currently written criminalizes the solicitation of an act that is not itself criminal. To resolve this, the Anti-Prostitution Amendment Act of 2005 establishes the crime of prostitution.

The Anti-Prostitution Amendment Act of 2005 also amends D.C. Official Code §§ 22-2704 and 22-2705 to clarify the enticing children for prostitution and pandering statutes and to raise the penalties in the pandering statutes to provide additional protections to the District’s children. Although enticing or abducting a child from his or her home for purposes of prostitution is currently punishable by up to 20 years incarceration, pandering is currently punishable by only five years incarceration, a \$1,000 fine, or both, without regard to whether the individual being prostituted is an adult or child. Under the Bill, a person who procures a child for the purposes of prostitution could also be punished by imprisonment for not more than 20 years or a fine of not more than \$20,000, or both. Thus, the potential penalty for conduct that could be addressed by either statute will, as it should, be the same.

Title XXI of the Bill, the Prostitution Free Zone Act of 2005 would, under certain circumstances, authorize the Chief of Police to declare any public area as a prostitution free zone for a period not to exceed 120 consecutive hours. This Bill is modeled on the existing drug free zone statute which has proven effective in moving along would-be drug sellers and purchasers.<sup>19</sup>

Under the proposed enforcement scheme, the Chief of Police, after considering factors including the occurrence of prostitution-related arrests in an area and any homicides or crimes of violence related to prostitution that occurred in the proposed prostitution-free zone, may declare a specific area as a prostitution-free zone for up to five days. The Chief of Police must notify the District and Special Investigations Division Commanders, as well as the Council of the District of Columbia, of the declared prostitution-free zone and clearly mark each block within the area as a prostitution-free zone, notifying the public that it is an area where it is unlawful to congregate in a group of two or more for the purposes of prostitution, and to fail to disperse when ordered to do so. Officers are authorized under the Act to disperse persons congregating in groups of two or more for the purpose of engaging in prostitution or prostitution-related activities. Persons who fail to disperse as ordered would be subject to a misdemeanor arrest.

---

<sup>18</sup> Prostitutes are technically charged with inviting persons for purposes of prostitution. See D.C. Official Code § 22-2701.

<sup>19</sup> See D.C. Official Code § 48-1001 *et seq.* In FY 2004, MPD instituted 140 drug free zones. The fact that only three people were charged with a violation of the Drug Free Zone Act during this period shows that the enforcement of the Act was effective. Would be drug trade participants left the drug free zones.

While no other jurisdiction has enacted similarly titled legislation, numerous states and municipalities, most notably California, Cal. Pen. Code § 653.22, have enacted provisions that prohibit loitering for the purpose of engaging or attempting to engage in prostitution. Maryland and Virginia, however, do not have such laws.

As I discussed earlier when addressing the Gang Recruitment Prevention Act of 2005, if a statute is to pass constitutional muster, it must give fair warning of the conduct that is prohibited; it must require an intent to violate the law; it must not afford the police unfettered discretion in determining whom to arrest; and it must not have a chilling effect on the exercise of constitutional rights such as freedom of association.

The Prostitution Free Zone Act addresses these issues by: 1) giving fair warning of the prohibited conduct by both posting the designated zone with notices of prohibited conduct and by mandating an officer's statement of the reason for any directive to disperse before any arrest can be made; 2) requiring that the prohibited loitering be for the specific purpose of prostitution or prostitution-related offenses; 3) limiting the discretion of the police by restricting the time a zone can be declared to 120 hours, tying the establishment of a zone to objective evidence that congregation for prostitution purposes was occurring therein, and requiring that officers use objective criteria to reach a reasonable determination that a person is congregating in a prostitution free zone for the purpose of engaging in prostitution or prostitution-related offenses; and 4) limiting any chilling effect upon a person's freedom of association by imposing a duty of observation upon the officer to determine if the suspected violator's purpose for being in the zone was for an apparent lawful reason.

#### Title XXII – Privacy Protection Act of 2005

In this world of changing technology, prosecutors in the District and elsewhere find themselves challenged in applying old laws to new circumstances. Cellular phones with cameras, button size video cameras, the Internet, and a host of other technological advances have made it easier to invade someone's privacy and increasingly difficult to prevent such invasions.

For example, in the District of Columbia there are no criminal laws that prohibit someone from secretly filming up a woman's dress; yet doing so has become increasingly common in this age of miniature cameras. This practice has come to be known as "upskirting." Let me give you an example of such a case. Last summer my Office was referred a case where a man was caught surreptitiously filming up a woman's skirt at a concert. His goal was to display the pictures on the Internet. Although our neighboring state of Virginia has enacted a law to address this conduct,<sup>20</sup> which criminalizes the unlawful filming, videotaping or photographing of another – but the District has not. The most that we were able to charge this man with was disorderly conduct under D.C. Official Code §22-1321; a charge that seems woefully inadequate under the circumstances. Moreover, to prove this charge, the government is required to demonstrate that the defendant "act[ed] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others" and that he did so "with the intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby."

---

<sup>20</sup> Va. Code Ann. §18.2-386.1.

In addition to Virginia, seven other states, including Maryland, have enacted laws that prohibit the filming or other recording of anyone in areas where a person has a reasonable expectation of privacy. The names of these laws include: Electronic Voyeurism; Invasion of Privacy; Electronic Eavesdropping; or as we have adopted, Privacy Protection. The other states include Arizona, Hawaii, Pennsylvania, and Louisiana. Each of these state laws describes the type of prohibited recording and defines a zone of privacy in which any recording is prohibited.

The Privacy Protection Act of 2005 is designed to fill a void in the District's criminal code by establishing more appropriate crimes to fit the upskirting situation as well as to bring our jurisdiction in line with other states that have outlawed surreptitious viewing, taping, and dissemination of private activities. Under the Act a person who is convicted of upskirting would face a fine of not more than \$1,000 or imprisonment for not more than 180 days, or both. A person who was convicted of using a peep hole, an electronic device, or of electronically recording people doing their most private activities would face a fine of not more than \$5,000 or imprisonment of not more than five years, or both.

---

Before concluding, I would like to share some thoughts regarding the Criminal Code Reform Commission Establishment Act of 2005 and the Criminal Code Modernization Amendment Act of 2005.

#### Bill 16-172 – the Criminal Code Reform Commission Establishment Act of 2005

The Criminal Code Reform Commission Establishment Act of 2005 was introduced by Councilmember Patterson and co-sponsored by Councilmember Ambrose. At the onset I would note that under Councilmember Patterson's leadership our offices worked closely on the Elimination of Outdated Crimes Amendment Act of 2003. That Act repealed a wide range of criminal statutes that were outmoded, superseded by more recent statutes or which represented activities which were no longer considered appropriate for criminal sanctions. As the Committee Report on that Bill noted,

Bill 15-79 also represents a first step toward a more comprehensive review and classification of the District of Columbia's criminal penalties, which currently lack any structure and vary widely. By eliminating criminal-code provisions that are almost universally regarded as unnecessary and inappropriate, policymakers will be able to focus future attention on more complex and systemic issues pertaining to the criminal code.

The Criminal Code Reform Commission Establishment Act of 2005 is the next step in this process. As such, I support the creation of a Commission that would be tasked with rationalizing the criminal code.

In addition to the specific functions set forth in section 3 of the Bill, I would recommend that the Commission also be assigned two additional tasks. I suggest that the Commission

consider, and make a recommendation on, whether Titles 22 of the Code should be enacted. The enactment of this Title would ensure that amendments to the criminal code accomplish their intended result. It is far too easy to miss one of a series of enabling statutes in a long recitation and not amend the criminal code in the intended way. One need go no further than Title XX of the Omnibus Public Safety Act of 2005 to see my point. In that Title, to establish the crime of prostitution, six separate enabling statutes had to be amended simply to establish three definitions. In addition, as the Commission is tasked with performing a detailed analysis of Title 22, I would suggest that the Commission also be tasked with reviewing what criminal activities may rely on D.C. Official Code § 22-1807 for a penalty prior to repealing that provision as provided for in section 3 of the Criminal Code Modernization Amendment Act of 2005.

I would also suggest that the membership of the Commission, outlined in section 4, be amended to ensure that at least one member be a non-attorney citizen of the District of Columbia who is appointed because of their ability to represent the interests of victims of crime.

Given the scope of this project, including a complete review of the criminal code and the formulation of well thought out consensus recommendations, I do not believe that a comprehensive work product could be accomplished within the nine-month period allotted in this Bill. In addition, I believe that the Criminal Code Reform Commission could benefit from an examination of the work being done by the Sentencing Commission and should have an opportunity to carefully study their 2006 report prior to making recommendations concerning the proportionality of penalties. Therefore, I recommend that the Council allow the Criminal Code Reform Commission at least two years from the completion of the Sentencing Commission's report to complete its tasks.

#### Bill 16-130 – the Criminal Code Modernization Amendment Act Of 2005

In general, I support the provisions of the Criminal Code Modernization Amendment Act of 2005. I would, however, make the following comments:

First, although section 2 appropriately identifies D.C. Official Code § 22-1312 as a section in need of modernization, the language amending the statute to limit the crime to persons who make lewd, obscene, or indecent sexual proposals to a child under 16, and to certain persons who are mentally retarded or suffer from mental illness, may actually make it harder to protect some of those vulnerable groups.

As the statute is currently written, those groups fall within its protections, and the prosecution of such an offense is very straightforward. If the statute is amended as proposed, the government would have to prove an additional element, i.e., that the individual is mentally ill or mentally retarded. This may mean that additional witnesses would be required, such as doctors or other experts, who could establish that the victim fell within that category. Moreover, the amendment would prevent one of the primary current uses of this statute, namely as a tool against prostitution. Prostitutes often, in an attempt to identify undercover police officers and avoid prosecution, request that potential 'clients' show the prostitute their genitalia as a prelude to negotiating the sexual act. If the 'client' is an undercover officer, who cannot

and will not comply with the request, the prostitute will cease negotiations. Because the proposal occurs prior to the actual negotiation, the prostitutes cannot be arrested for solicitation of prostitution at that point. Currently, police officers use D.C. Official Code § 22-1312 as a way to foil that attempt to evade arrest because the request to show genitalia is a separate arrestable offense, that is, indecent proposal. As the statute would be amended, however, prostitutes would be able to use that ploy successfully to avoid prosecution. Thus, instead, to modernize that statute, we would suggest striking the words “or to commit any other lewd, obscene, or indecent act.” That section of the Act has been found by the courts to be unconstitutionally vague.

Second, as stated previously, I believe that before the Council considers repealing D.C. Official Code § 22-1807, which is a catch-all penalty provision for offenses not covered by other provisions of the criminal code, we should be certain that the only crime that relies on that provision for a penalty is solicitation of murder. I suggest postponing the repeal of this provision until after the Criminal Code Reform Commission has had an opportunity to review the entire criminal code.

Third, in Section 4 of the Bill, I agree that we need a penalty provision for solicitation of murder, and suggest that we also establish a penalty provision for solicitation of any felony.

I want to thank you for the opportunity to testify on all three pieces of legislation. I am happy to answer any questions you may have and I would ask that my written testimony and appendices be made part of the record.